PRINCIPLES

OF

CRIMINAL LAW.

BY

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"AUTHOR OF A CONCISE DIGEST OF THE INSTITUTES OF GAIUS AND JUSTINIAN."

THIRD EDITION, REVISED BY THE AUTHOR AND AVIEL AGABEG.

WITH ADDITIONS AND NOTES,

ADAPTING IT TO THE AMERICAN LAW,

BY

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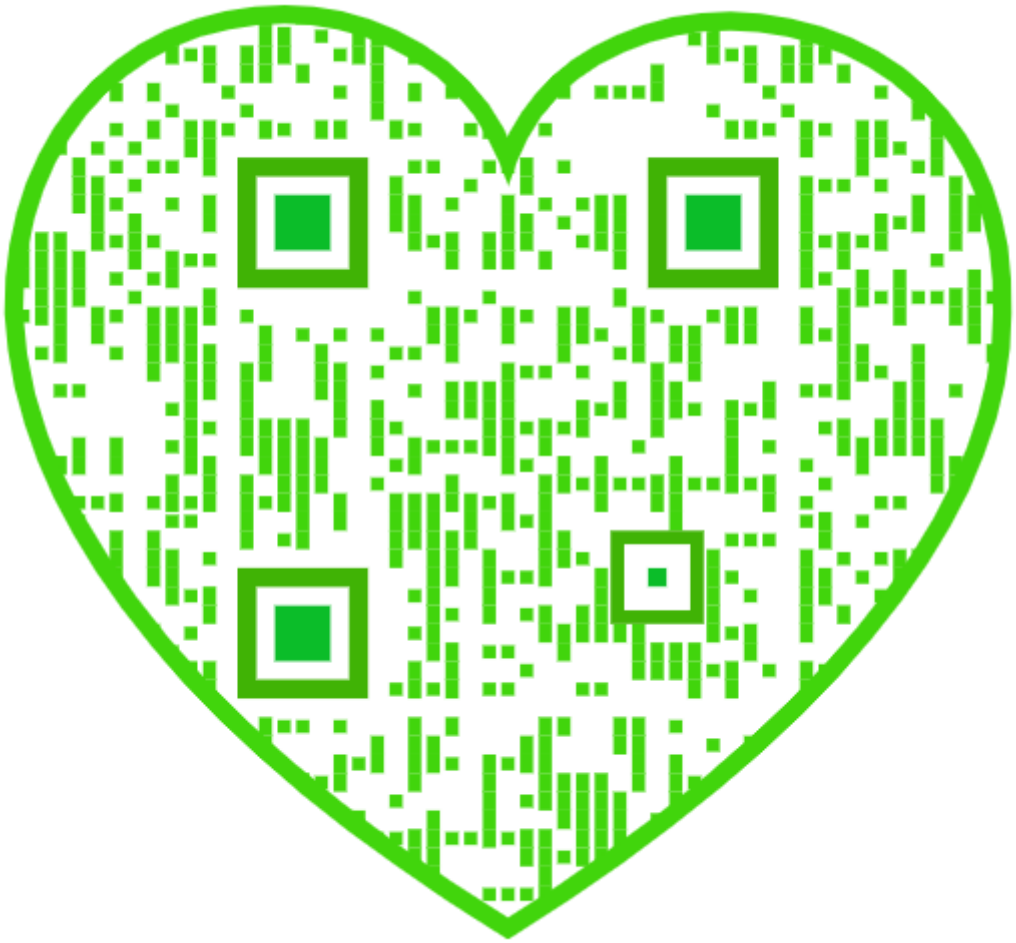

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PREFACE TO THE THIRD EDITION.

THE legislation and cases belonging to the short period which has elapsed since the publication of the last edition have been embodied in this Third Edition. The work has been thoroughly revised, and it is again sent forth with the hope that a reception equally favorable with that given to the two former editions will be accorded to it.

PREFACE TO THE AMERICAN EDITION.

HARRIS' PRINCIPLES OF CRIMINAL LAW meets a want that has been felt, of a concise and comprehensive statement of that branch of the law. A large part of the work, being an abridgment of recent English legislation, has been omitted, and its place supplied by matter setting forth the law as enacted and held in the United States. Additional English authorities have been cited on points which seemed to require a somewhat fuller exposition.

M. F. F.

CINCINNATI, 1879.

The following compilations and revisions are cited as "Rev. Stats.:" Revised Statutes of the United States, printed 1875; General Statutes of Kentucky, edited by Bullitt and Feland, 1877, and the authorized Code of Criminal Practice of Kentucky, prepared by H. Marshall Buford, published 1876; Revised Statutes of Indiana, with subsequent legislation, edited by E. A. Davis, published 1876; Revised Statutes of Illinois, compiled and edited by Harvey B. Hurd, 1877; the Code of Iowa, printed by authority, 1873; the Compiled Laws of Michigan, compiled under act of 25th January, 1871, by James S. Dewey, and published 1872.

PREFACE TO THE ENGLISH EDITION.

THE appearance of a new work on the Criminal Law may demand a few words of explanation. Many treatises dealing with this subject are already in existence. Why another? A mere enumeration of the modern standard authors will disclose the want of a manual which neither confines itself to the historical and philosophical view of the matter, nor descends into the minute particulars of the practice of the law. To mention those that are best known:—"Russell on Crimes" is contained in three bulky volumes, and has little concern with criminal procedure. Archbold's and Roscoe's Criminal Practice, entering into every detail, are designed for the reference of the practitioner, when points actually present themselves. The modern commentaries founded on those of Blackstone stray into historical disquisitions which are apt to envelop the existing law in obscurity; and, besides, the Criminal Law is contained in one of four volumes. Sir James Fitzjames Stephen's "General View of Criminal Law" does not profess to be an exposition of the offenses and criminal procedure of our country; it has quite another object.

It seems, then, that there is scope for a comparatively small treatise concerning itself with the nature of crimes, the various offenses punished by the law, and the proceedings which are instituted to secure that punishment. Such a work is calculated to meet the requirements of the young practitioner, who, in the first instance, wants a general introduction to the subject. It is also designed for the use of students, especially those preparing for the final examination of the Incorporated Law Society. To such, as well as to the general reader, it is hoped that the present undertaking will commend itself.

We have referred above to certain well-known works on Criminal Law. These, the reports, the older text-books, and

other authorities have been made to contribute information as the occasion required. Special acknowledgment is due, and is hereby rendered, to the "General View" of Sir James Fitzjames Stephen, from which frequent quotations have been made and matter borrowed, to an extent sufficient to lead to further perusal of that work.

It is hoped that, while nothing useless and obsolete has been retained, there has not been any omission which will prevent the reader from obtaining a fair general view of the existing Criminal Law.

S. F. H.

LIVERPOOL, *Spring Assizes*, 1877.

An explanation must be given of the manner in which the punishments affixed to the various crimes are set forth in the body of the work. It was thought that much repetition might be avoided if attention were drawn to a few general rules. Only the maximum limit of penal servitude is noticed in the text, as, with very few exceptions which are specially pointed out, the minimum limit is five years. Where penal servitude may be awarded, almost without exception (any exception being mentioned), the court has the alternative of sentencing to imprisonment for a term not exceeding two years; therefore such imprisonment has not generally been specified. The rules as to hard labor, whipping, and solitary confinement are adverted to in the chapter on Punishment.

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ABBREVIATIONS,

NOTICING

EDITIONS OF TEXT BOOKS AND PERIODS COMPRISED IN REPORTS.

Addison, . .	Addison on Torts, 1873.
A. & E. . . .	Adolphus and Ellis's Reports, K. B., 1834–1841.
Arch. . . .	Archbold's Pleading and Evidence in Criminal Cases, 1875.
Arch. Q. S. . .	Archbold's Quarter Sessions, 1869.
Austin, . .	Lectures on Jurisprudence, 1869.
Bac. Abr. . .	Bacon's Abridgment.
Barn. K. B. . .	Barnardiston's Reps., K. B., 1724–1734.
B. & Ald. . .	Barnewall and Alderson's Reps., K. B., 1818–1822.
B. & C. . .	Barnewall and Cresswell's Reps., K. B., 1823–1830.
Best Ev. . . .	Best on Evidence, 1870.
B. & S. . .	Best and Smith's Reps., Q. B., 1861–1870.
Bing. . . .	Bingham's Reps., C. P., 1822–1834.
Bing. N. C. . .	Bingham's Reps., New Cases, C. P., 1834–1840.
Bl.	Blackstone's Commentaries.
Bl. W. . . .	Blackstone's (William) Reps., K. B., 1746–1749.
Broom, C. L. . .	Broom's Common Law, 1875.
Bull. N. P. . .	Buller's Nisi Prius.
Burn's, . . .	Burn's Justice of the Peace, 1869.
Burr. . . .	Burrow's Reps., K. B., 1756–1772.
Camp. . . .	Campbell's Reps., Nisi Prius, 1807–1816.
C. & K. . .	Carrington's and Kirwin's Reps., N. P., 1843–1852.
C. & M. . . .	Carrington & Marshman's Reps., N. P. 1842.
C. & P. . .	Carrington and Payne's Reps., N. P., 1823–1841.
Chitty, Cr. L. . .	Chitty's Criminal Law.
Chitty, St. . .	Chitty's Statutes, 1865.
Cl. & Fin. . .	Clark and Finnelly's Reps., H. of Lords, 1831–46.
C. B. . . .	Common Bench Reps., 1845–1857.
C. B. (N.S.) . .	Common Bench Reps., New Series, 1857–1865.
Corner's Cr. Practice,	Corner's Crown Practice.
Cox, ...	Cox's Criminal Cases, from 1843.
C. M. & R. . .	Crompton, Meeson, and Roscoe's Reps., Exch., 1834–1836.

Dalton,	Dalton's Justice.
Den.	Denison's Crown Cases, 1844.
Doug.	Douglas Reps., K. B., 1778–1785.
D. & R.	Dowling and Ryland's Reps., K. B., 1822–1828.
Dowl. P. C.	Dowling's Practice Cases, K. B., 1830–1841.
East,	East's Reps., K. B., 1801–1814.
East, P. C.,	East's Pleas of the Crown.
Ell. & Bl.	Ellis and Blackburn's Reps., Q. B., 1851–1858.
Esp.	Espinasse's Reps., N. P., 1793–1807.
Exch.	Exchequer Reps., 1847–1857.
Fitz. St.	Stephen's General View of Criminal Law, 1863
Fost.	Foster's Reps., Crown Law, 1743–1761.
F. & F.	Foster and Finlason's Reps., N. P., 1858–1865.
Hale, P. C.	Hale's Pleas of the Crown.
Hal. Sum.	Hale's Summary.
Hawk.	Hawkins' Pleas of the Crown.
How. St. Tr.	Howell's State Trials.
H. & C.	Hurlstone and Coltman's Reps., Exch., 1862–67.
Inst.	Coke's Institutes.
Jur.	Jurist Reps., 1837–1854.
Jur. (N.S.)	Jurist Reps., New Series, 1855–1865.
Kel.	Sir John Kelyng's Reps., K. B., 1673–1706.
L. J.	Law Journal Reps. in all the Courts, from 1831 (thus, L. J. (Q.B.), Queen's Bench Reps.; L. J. (M.C.), Magistrates' Cases).
L. R.	Law Reps. in all the Courts, from 1865.
L. T. (N.S.)	Law Times Reps., New Series, from 1859.
Leach,	Leach's Crown Cases, 1730–1788.
L. & C.	Leigh & Cave's Crown Cases, 1861–1865.
Lew. C. C.	Lewin's Crown Cases, 1822–1833.
Lord Raym.	Lord Raymond's Reps., K. B., 1694–1734.
M. & S.	Maule & Selwyn's Reps., K. B. 1813–1817.
May,	May's Parliamentary Practice, 1874.
Mood. C. C.	Moody's Crown Cases, 1824–1844.
Moo. & M.	Moody & Malkin's Reps., N. P., 1826–1830.
M. & R.	Moody & Robinson's Reps., N. P. 1830–1844.
Oke, Mag. Form.	Oke's Magisterial Formulist, 1868.
Oke, Mag. Syn.	Oke's Magisterial Synopsis, 1868.

Paley, Sum. Con.	Paley's Summary Convictions, 1861.
Peake, . . .	Peake's Reps., N. P., 1790–1812.
Ph. Ev. . . .	Phillips' Evidence.
Q. B. . . .	Queen's Bench Reps. (Adolphus and Ellis), 1841–1852.
Rosc. . . .	Roscoe's Evidence in Criminal Cases, 1874.
Russ. . . .	Russell on Crimes, by Greaves, 1865.
R. & R. . . .	Russell and Ryan's Criminal Cases, 1799–1824.
Ry. & M. . .	Ryan & Moody's Reps., N. P., 1823–1826.
Sm. L. C. . .	Smith's Leading Cases, 1875.
Stark. N. P. C. .	Starkie's Reps., N. P., 1815–1823.
St. Tr. . . .	State Trials.
St. Bl. . . .	Stephen's Commentaries, 1874.
Str.	Strange's Reps., K. B., 1716–1747.
Tayl. Ev. . .	Taylor's Evidence, 1872.
T. R. . . .	Term Reps. (Dunford and East), 1785–1800
T. Raym. . .	Sir Thomas Raymond's Reps., K. B., 1660–1684.
Willes. . . .	Willes' Reps., C. P., 1734–1758.

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PRINCIPLES

OF

THE CRIMINAL LAW.

BOOK I.

INTRODUCTORY CHAPTER.

CRIME.

The term "*crime*" admits of description rather than definition. There are no certain and universal intrinsic qualities which at once stamp an act with the character of a crime. We term a flagitious act a crime rather on account of its consequences, than from regard to any such intrinsic characteristics. Thus, turning to one of the most satisfactory explanations of the term under consideration, we learn that it is "an act of disobedience to a law forbidden under pain of punishment." (*a*)

The question at once presents itself, what are the distinguishing marks of "punishments?" This will, perhaps, be seen most clearly by a contrast. Sanctions (that is, evils incurred by a person in consequence of disobedience to a command, and thus enforcing that command) fall under two heads:

1. Those which consist in the wrong-doer being obliged to indemnify the injured party, either in the way of damages or of specific performance.
2. Some sufferings experienced by the wrong-doer.

(*a*) Fitz. St. 1.

In the first case, the enforcement of the sanction is in the discretion of the injured party (or his representative), and its object is his advantage.

In the second case, the sanction is imposed for the public benefit, and is enforced or remitted at the discretion of the sovereign body,(*b*) as the representative of the public; such discretion being exercised according to law.(*c*)

Here we arrive at the true ground of distinction (or rather difference, inasmuch as the two terms do not exclude each other, and therefore can not be distinguished (*d*)) between crimes and civil injuries or torts. The difference is not a difference between the tendencies of the two classes of wrongs, but a difference between the modes in which they are respectively pursued; that is, whether as in the first or second of the cases mentioned above.(*e*)

That there is nothing in the nature of a crime which, *per se*, determines that a particular wrongful act should be necessarily relegated to the category of crime, two considerations will suffice to show. First. In different countries, and at different eras in the history of the same country, the line between *civil* and *criminal* is, and has been, utterly different. For example, at Rome theft was regarded as a civil injury, for which pecuniary redress had to be made. And we have only to point back to the Anglo-Saxon system, to illustrate the narrowness of the domain of criminal law in rude societies. The second consideration is, that the same wrongful act is regarded as a crime or a civil injury according as it is viewed, and proceedings are taken with reference to the one or the other sanction. In the English law, the best examples of this are libels and assaults. The same writings, or

(*b*) Sometimes the exercise of this discretion is deputed to some member of the sovereign body, *e. g.*, in England, to the king or queen

(*c*) Fitz. St. 4; Austin, 518.

(*d*) "To ask whether an act is a crime or a tort, is like asking whether a man is a husband or a brother." Fitz. St. 7.

(*e*) Austin, 417. A good description of crimes having in view the true ground of difference, is given in 1 Bishop Crim. L. § 43: "Those wrongs which the government *notices* as injurious to the public, and punishes in what is called a criminal proceeding, in its own name."

the same actions, may be made the subject of civil or of criminal proceedings. If A. write of B. that he is a swindler, B. may either indict A. for the crime, or bring an action against him for the civil injury.(*f*)

It may be well to interpose an explanation of the courses open to the injured person, when the same wrong is both a crime and a civil injury. He has not always the power of choosing in which way he will proceed. The rule is based on the distinction of crimes into felonies and misdemeanors.(*g*) In the case of felonies, the crime must be prosecuted before civil redress can be sought from the wrong-doer. In misdemeanors there is no such distinction; either proceeding may be taken first, or both may be pursued concurrently.(*h*) (1)

Before leaving the subject of the difference between crimes and civil injuries, two other false and groundless distinctions may be adverted to. Firstly. The distinction does not consist in this, that the mischief of crimes (as a class) is more extensive than that of civil injuries (as a class); nor, secondly, in this, that the end of the sanction in the case of crimes is prevention, in the case of civil injuries redress to the injured party.(*i*)

How nearly the two classes are related, even when the act can not be regarded as common to both, an example will serve to show. A. knowingly, fraudulently, and with intent to deceive B., sells him a quantity of beer, short of the just measure. This was held to be only an inconvenience and injury to a private person, which might have been

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(*f*) Austin, 417, 518.
(*g*) v. p. 9.
(*h*) Addison on Torts, 31, 33.
(*i*) Austin, 417, 520.

(1) In England, it is the duty of the injured person to institute and direct the criminal prosecution. In the United States, the injured person may, and ought to, be instrumental in procuring the arrest of the offender; but it is neither his duty nor his right to take any further part in bringing the charge before the grand jury, or in conducting the prosecution; the state's attorney has the sole control. Hence, generally, in the United States, the rule no longer exists, that a felony must be criminally prosecuted before reparation can be recovered from the wrong-doer in a civil action. The practice, however, is not uniform. Cases and statutes are cited in 1 Bishop Crim. L., Ed. 1868, §§ 556–562.

guarded against with due caution.(*k*) But if the defect in the amount had been owing to a false vessel for measuring, A. would have been indictable. So was S., who delivered a quantity of coals, to his knowledge weighing 14 cwt., he falsely and fraudulently representing that the quantity he had delivered weighed 18 cwt., and thereby obtaining the price of 18 cwt.(*l*)

It is often of the utmost importance to determine whether a particular proceeding is a criminal or a civil proceeding. Thus, the evidence of the defendant may be required; and this is not allowed to be given in criminal, though of course it is in civil, trials. The question arose on an information for the recovery of penalties for smuggling, under a particular statute.(*m*) The true test is whether or not the infliction of punishment follows on the result being unfavorable to the defendant. If the end of the proceeding is that the defendant is required to pay a sum of money, the question will resolve itself into the form, whether the fine is a debt or a punishment.(*n*)

The moral nature of an act is an element of no value in determining whether it is criminal or not. On the one hand, an act may be grossly immoral, and yet it may not bring its agent within the pale of the criminal law—as in the case of adultery. "Human laws are made, not to punish sin, but to prevent crime and mischief." (*o*) On the other hand, an act perfectly innocent, from a moral point of view, may render the doer amenable to punishment as a criminal. To take an extreme example: W. was convicted on an indictment for a common nuisance, for erecting an embankment, which, although it was, in some degree, a hindrance to navigation, was advantageous, in a greater degree, to the users of the port.(*p*) Here the motive, if not praiseworthy, was at least innocent. The fact that the mo-

(*k*) R. *v.* Wheatley, 2 Burr. 1125.
(*l*) R. *v.* Sherwood, 26 L. J. (M. C.) 81.
(*m*) Attorney-General *v.* Radloff, 10 Exch. 84.
(*n*) Cattell *v.* Ireson, 27 L. J. (M. C.) 167.
(*o*) Attorney-General *v.* Sillem, 2 H. & C. 526.
(*p*) R. *v.* Ward, 5 L. J. (K. B.) 221.

tive of the defendant was positively pious and laudable has not prevented a conviction.(q)

This forces upon our notice a division of crimes into *mala in se* and *mala quia prohibita;* a distinction which is of little practical importance in our English system, and which must necessarily vary with the standard of good and bad.(r) There will always be some crimes which naturally take their place in the one class or the other; for example, no one will hesitate to say that murder is *malum in se*, or that the secret importation of articles liable to custom is merely *malum quia prohibitum;* but between these offenses there are many acts which it is difficult to assign to their proper class.

Some acts have been recognized as crimes in the English Law from time immemorial, though their punishment and incidents may have been affected by legislation. Thus murder and rape are crimes at *common law.* In other cases, acts have been pronounced crimes by particular *statutes*, which have also provided for their punishment, *e. g.*, offenses under the bankruptcy laws.

[There is no common law jurisdiction of crimes in Ohio. This was declared by the supreme court of the state, in Key *v.* Vattier, 1 Ohio, 132, and in many subsequent cases. There is no crime, or punishment, or criminal procedure in Ohio other than what has been defined or prescribed by statute. Misprisions, attempts, conspiracy, and all accessorial offenses are substantive crimes, so far as they have been declared by statute; and, in the absence of statute, are not punishable. The common law is used, however, to define words used in the statutes. The same rule prevails in Indiana; (1) and in Iowa.(2) In Indiana and Iowa the rule is prescribed by statute. But the states generally hold that common law crimes are indictable, and common law punishments can be imposed by courts having general crim-

(q) R. *v.* Sharpe, 26 L. J. (M. C.) 47.

(r) Austin, 590.

(1) Beals *v.* The State, 15 Ind. 378; State *v.* O. & M. R. R. Co., 23 Ind. 362.

(2) Estes *v.* Carter, 10 Iowa, 400.

inal jurisdiction, except so far as the common law has been repealed or modified by statute. Hence, an indictment for conspiracy is good in Minnesota, though there is no mention of conspiracy in the statutes (1) In Scotland, the common law power of courts extends to declaring and punishing as crimes, acts not made criminal by statute, and which have never before been indicted.(2)]

In treating of the criminal law, or the pleas of the crown,(*s*) the subject naturally divides itself into two portions. The first, dealing with crimes generally, and the various individual crimes, their constituents, their differences, appropriate punishments, and other incidents, may be termed *The Law of Crimes.* The second, dealing with the machinery by means of which these crimes are prevented, or, if committed, by means of which they meet with their punishment, may be termed *The Law of Criminal Procedure.*

(*s*) So called because the king is supposed by the law to be the person injured by every infraction of the public rights belonging to that community, and is, therefore, in all cases, the proper prosecutor for every public offense. 4 Bl. 2.

(1) State *v.* Pulle, 12 Minn. 164.

(2) Greenhuff's case, 2 Swinton, 236, cited 1 Bishop Crim. L., Ed. 1868, 18.

CHAPTER II.

DIVISIONS OF CRIME.

Crime—Offense.—These terms are sometimes used synonymously of the whole of illegal acts which entail punishment. Each of them, however, has sometimes a narrower signification; and in this sense they are opposed to each other, and divide between them the whole field of acts which each in its wider sense covers. The latter use is that which confines the term "offense" to acts which are not indictable, but which are punished on summary conviction; while "crime" is restricted to those which are the subjects of indictment.

[The state courts have general jurisdiction over crimes under the common law or under statutes of the state, committed within the state. The federal courts have no common law jurisdiction over crime, but, under acts of congress, have general jurisdiction over crime committed upon American vessels upon the high seas (such vessel being American territory, and yet not within the limits of any county), or committed within the District of Columbia, or any other place where the United States have exclusive jurisdiction. Murder, manslaughter, mayhem, rape, bigamy, arson, larceny, and receiving stolen goods, if committed in any place over which the United States have exclusive jurisdiction, are prosecuted in the United States Circuit Courts. The federal courts have jurisdiction also over treason and other crimes against the general government; crimes affecting the maritime and commercial jurisdiction of the general government; perjury before a federal tribunal, and other crimes affecting the administration of justice by the federal tribunals; forgery of United States securities, or of other papers issued by the government, or to be used in obtaining money from the United States; crimes affecting coinage, mails, public revenue, bribery of

officers under the government, and other crimes against the operations of the government; criminal official misconduct of officers of the general government, and crimes under the constitution of the United States against the elective franchise or civil rights. Military and naval offenses are prosecuted before courts martial, and crimes in the territories before territorial courts.]

Indictable crimes.—All treasons, felonies, and misdemeanors, misprisions of treason and felony, whether existing at common law or created by statute, are the subjects of indictment. So also are all attempts to commit any of these acts;(*u*) and even an intention to commit high treason is indictable. Further, if a statute prohibits a matter of public grievance, or commands a matter of public convenience (such as the repairing of highways or the like), all acts or omissions contrary to the prohibition or command of the statute, being misdemeanors at common law, are punishable by indictment, if the statute does not manifestly seem to exclude this mode of proceeding.(*r*) (1) But it is otherwise, if the rights which are regulated are merely private. If the statute, on which the indictment is framed, is repealed, no proceedings can be taken, provided at least the prisoner has not pleaded.(*x*)

Misprision.—In general, this term signifies some neglect or contempt, especially when a person, without assenting thereto, knows of any treason or felony and conceals it.(*y*) But it is also applied to every great misdemeanor which has no certain name given to it in the law; for example, the maladministration of public officers. The former kind is sometimes termed *negative*, the latter *positive*, misprision.

The main classification of indictable crimes is threefold —Treason, Felony, Misdemeanor—though "treason" is strictly included in the term "felony."

Felony—Misdemeanor.—It will be remembered that, in contrasting crimes and civil injuries, we found that there

(*u*) v. p. 19. (*v*) 2 Hawk. c. 25, § 4.
(*x*) R. *v.* Denton, 21 L. J. (M. C.) 207. (*y*) v. pp. 54, 87.
(1) See p. 5, as to states where there is no indictable crime but such as is defined by statute.

were no intrinsic qualities the possession of which assigned an act to either class. In distinguishing felony from misdemeanor, we shall also find that the difference is only one founded on the consequences of each. But the latter classification is exhaustive, and not a cross-division, as in the case of crimes and civil injuries, inasmuch as the same act can not be both a felony and a misdemeanor.

[In the United States, the distinction between felony and misdemeanor has lost most of its significance. Felony no longer works forfeiture of either goods or lands; benefit of the clergy does not exist; where the crime of an accessory is made by statute a substantive offense, as it is in most of the states, an accessory can be convicted before the principal is indicted; generally a civil action for damages can be brought before a criminal prosecution is instituted; a person charged with misdemeanors, as well as one charged with felony, is brought before the court in the first instance by a *capias;* in most of the states one indicted for felony can be found not guilty of the felony but guilty of an included misdemeanor; and in cases of felony and misdemeanor alike, the accused is entitled to have a copy of the indictment, and to be defended by counsel. In states where there is no crime but statutory crime, the distinction is little more than a classification of punishment. Generally, in the United States, felony means an offense punishable by death or by imprisonment in the penitentiary; and misdemeanor is a punishable offense which is not a felony. In some states, as New York, Kentucky, Ohio, Michigan, Indiana, Illinois, and Wisconsin, this classification is expressly made by statute. And in Iowa, where there is no capital punishment, any crime punished by imprisonment in the penitentiary is felony. It is essential to the validity of a trial for felony that the defendant be present in court. This is not essential in misdemeanors. Also an unofficial person may arrest where a felony has been committed; but not in case of a misdemeanor.]

It is a popular idea, which, to a certain extent, the law has countenanced, that the distinction into felonies and misdemeanors is one founded on the degree of enormity of the

crime. That this is not the case necessarily, will be seen when we consider what offenses belong to the one class, and what to the other. No one will maintain that perjury, which is a misdemeanor, is of less gravity than simple larceny, which is a felony. As a rule, however, the more serious crimes are felonies.

What, then, is the origin and force of this distinction, a distinction attended with important consequences? To obtain an answer, we must look back to the period of feudal law. The term "*felony*" is derived from two words,(*z*) the one signifying a fief or feud, the other price or value. Thus the term was applied to those offenses which resulted in the tenant's forfeiture of his *land* to the lord of the fee; though primarily it signified the penal consequences, *i. e.*, the forfeiture, of these offenses. By another slight deflection, the term was extended to offenses which involved forfeiture of *goods*. Blackstone thus defines a felony to be "an offense which occasions a total forfeiture of either lands or goods, or both, at the common law; and to which capital or other punishment *may* be superadded according to the degree of guilt." (*a*) Capital punishment, associated in the popular mind with felony, was an usual, though not a necessary, incident. Petit larceny was a felony, but not capitally punished; standing mute at a trial was punished with death, though not a felony. Though the ground of distinction into felony and misdemeanor was the consequence of the crime, of course, originally, there must have been some reason for attaching the graver consequences to one act and not to another. This was furnished by a consideration of the gravity and commonness of the offense, a consideration not attended to in later periods.(*b*)

It may be noticed that where a statute declares that an offender against its provisions shall be deemed to have *feloniously* committed the act, the offense is thereby made a felony.(*c*)

"*Misdemeanor*" is to be regarded as a negative expres-

(*z*) Fee-lon. For some conjectural derivations, v. 4 St. Bl. 7.
(*a*) 4 Bl. 95. (*b*) Fitz. St. 57.
(*c*) R. *v.* Johnson, 3 M. & Sel. 556.

sion; being applied to indictable crimes not falling within the class of felonies.(*d*) In a wide and general sense, the term is also used synonymously with "crime."

Recently,*the legislature struck at the root of the distinction we have been treating of; but the terms "felony" and "misdemeanor," having become firmly attached to the various indictable offenses, still remain. It was provided, that no confession, verdict, inquest, conviction, or judgment of or for any treason, or felony, or *felo de se* shall cause any attainder or corruption of blood, or any *forfeiture* or escheat.(*e*)

In addition to the distinction as to forfeiture, which we have just seen to be a thing of the past, there are other points, some nominal, others real, which distinguish felonies from misdemeanors:

i. As to *arrest*.—It will suffice here, to state generally that an arrest is justifiable in certain cases of supposed felony, where it would not be in cases of supposed misdemeanor.(*f*)

ii. As to the *trial*.—Misdemeanors may be tried upon an indictment, inquisition, or information; felonies upon the first two only.

The right of peremptory *challenge* is confined to those charged with felony.

The legislature requires that certain terms of penal servitude should be inflicted on those convicted of felony after a *previous conviction* for felony, or for certain misdemeanors: whereas there is no such provision with regard to misdemeanors committed after a previous conviction.

On minor points there is also a difference, *e. g.*, the form

(*d*) "Their general name—misdemeanors—bad behavior—happily describes their general character. The principal offenses included under this head are libel, conspiracy, and nuisance. The connection between them may not, at first sight, be apparent; but a comparison of their definitions will show that though, in some respects, they are dissimilar, the essence of all these offenses is the same. . . . Each of these offenses is based upon the notion of a normal state of repose and general order, which it is criminal to disturb either by writing, by any combination, or by any willful act or omission."—Fitz. St. 145.

(*e*) 33 and 34 Vict. c. 23, § 1. *1870 (*f*) v. p. 243 *et seq.*

of oath taken by the jury,(*g*) the mode of swearing the jury; again, in misdemeanors, the defendant is not given in charge to the jury;(*h*) and in felonies the prisoner must be present throughout the trial, and the jury, when the trial has once commenced, are not allowed to separate till their verdict has been given, or they have been discharged from giving a verdict; while a case of misdemeanor may be tried although the accused be not present, if he have previously pleaded,(*i*) and the jury are allowed to separate in the course of the trial just as in civil cases.

[In the United States felonies are tried upon indictment. Misdemeanors are mostly tried upon indictment. There are, in the larger cities, courts for the trial of specified misdemeanors, where there is no grand jury, and where the trial is by the judge unless the defendant demand a jury.

Peremptory challenges are allowed in cases of misdemeanor as well as felonies.

The form of oath administered to the jury in trials for felony, is, with slight variations, administered to the jury in all criminal prosecutions in the United States.]

iii. As to the *civil remedy*.—As we have seen,(*k*) the felony must be prosecuted before a civil action is commenced with reference to the same act; in misdemeanor, there is no such necessity.

(*g*) v. pp. 330, 333. (*h*) v. p. 334.

(*i*) 8th report of the Commissioners on Criminal Law, p. 143; 1 Chitty, Cr. L. 532; Arch. 155; v. also p. 373.

(*k*) v. p. 3, n.

CHAPTER III.

ESSENTIALS OF A CRIME.

In order to ascertain who are and who are not capable of committing crimes, it will be necessary to examine certain terms which are liable to confusion.

In the first place we must deal with those elements which occur in every case of crime; and the absence of either of which excludes the act from the category of crimes—viz., *Will*, *Criminal Intention*, or *Malice*. It will be more convenient to treat of them in this order, though obviously the reverse of the actual sequence of events. (1)

To *will* an act is "to go through that inward state which, as experience informs us, is always succeeded by motion" (*k*); that is, unless the body be physically incapable. And will is to be distinguished from those wishes which are not carried into execution; for example, excited by jealousy, I wish to kill B., but fear of the law prevents me from willing that act. If the act be not willed, it is said to be *involuntary*, and of course does not render its doer amenable to the criminal law.

(*k*) Fitz. St. 77.

(1) The text here will bear some qualification. It is, indeed, true, in general, that to constitute a crime there must be an act, and, contemporaneous with it, a criminal intent. But this is not always true, using the words in their ordinary sense; and in some cases, it is not true at all.

It is not always true that there must be an act, using the word in its ordinary sense. To constitute a misprision, it is not necessary there should be an active concealment, but only an omission to inform. To have in possession is not an act, yet it is a crime to have counterfeit coin or forged bills, with a criminal intent.

It is not always necessary that the defendant should intentionally or even consciously do the act which forms the crime; for one engaged in committing one crime may, without being aware of it, do a different act, and be guilty of a wholly different crime.

It is not always necessary that there should be a criminal intent

Intention is the "fixing the mind upon the act, and

It may indeed be said that as every person is presumed to know the law, whoever does an act prohibited by law intends to do an unlawful act. But it is undoubtedly competent for the legislature to make an act punishable at all events, without regard to the intent with which it is done. Under an English statute making it manslaughter for a parent willfully to neglect to provide adequate medical aid for his child, a parent was convicted, who, acting conscientiously as a member of a sect which prohibited medicine, but prescribed prayer only, not merely acted in ignorance of the law, but followed the course of treatment which he honestly believed was the best for the child's health. Queen *v.* Downes, L. R. 1 Q. B. Div. 25. And the Ohio statute expressly makes it a crime to intentionally and without malice point or aim any firearm at or toward any person, unless in self-defense or in discharge of duty. 74 Ohio L. 245.

While it is in general true that ignorance of the existence of facts which make the act a crime, is a defense against a prosecution for the crime, it is not held to be so universally. It is said in Stephens' Digest of Criminal Law, art. 34, p. 23 (American edition): "Where an offense is so defined by statute that the act of the offender is not a crime, unless some independent act co-exists with it, the court must decide whether it was the intention of the legislature that the person doing the forbidden act should do it at his peril, or that his ignorance of the independent fact, or his mistaken belief, in good faith and on reasonable grounds, that it did not exist, should excuse him."

An article by John Wilder May, in the American Law Review, for April, 1878, collects the cases on this point. It has been held in England that, in a prosecution for the unlawful taking of an unmarried female under the age of sixteen out of the possession or against the will of the person having lawful charge of her, ignorance of the fact that the girl was under the specified age is no defense. Reg. *v.* Robbins, 1 Car. & K. 452; Reg. *v.* Ollifer, 10 Cox, 402; Reg. *v.* Mycock, 12 Cox, 28; Reg. *v.* Butt, 12 Cox, 231; Reg. *v.* Prince, L. R., 2 C. C. R. 151.

In Massachusetts, it has been held that in a prosecution for selling liquor in violation of the statute, it is no defense that the defendant had no reason to suppose, and did not believe, the liquor sold to be intoxicating. Commonwealth *v.* Boynton, 2 Allen, 160. An analogous ruling was made in prosecutions for selling adulterated milk. Commonwealth *v.* Farren, 9 Allen, 489, and in Commonwealth *v.* Waite, 11 Allen, 264. And in a prosecution for selling naphtha under an assumed name. Commonwealth *v.* Wentworth, 118 Mass. 441. And in a prosecution for admitting a minor to a billiard-room, without the written consent of his parent or guardian, it was held no defense that the supposed minor was almost twenty years of age, fully grown, and did business independent of his parents, and that the defendant asked the alleged minor whether or not he was a minor, saying that

thinking of it as of one which will be performed when the

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if he was he must not enter, and he replied he was of full age. Commonwealth *v.* Emmons, 98 Mass. 6.

The same rule was followed in State *v.* Smith, 10 R. I. 258; Ulrick *v.* Commonwealth, 6 Bush, 400; State *v.* Herthel, 24 Wis. 60; and, in Missouri, in a *qui tam* action, Beckham *v.* Nacke, 56 Mo. 546. The contrary rule, however, was held in Miller & Gibson *v.* State, 3 Ohio St. 475.

But, unless the statute is clear to the contrary, there is no crime unless there is a criminal intent. Sometimes a particular criminal intent is requisite. In some states, the statute makes an intent to kill an essential ingredient in the crime of murder; an intent to commit a felony is necessary to constitute burglary; an intent to deprive the owner of goods of his property therein is necessary to make larceny; and, in malicious assaults, the particular intent determines the class of the offense—as intent to kill, intent to maim, intent to wound.

In many cases, only a general criminal intent, or malice, is requisite. Legal malice is a willful intent to do an unlawful injury. Where a person undertakes maliciously to do an unlawful act, and in the perpetration thereof does, unintentionally, another unlawful act, the unintentional act is also held to be done maliciously; and, hence, where the malice is sufficient in degree, such unintentional act is also a crime. Where a person in perpetrating or attempting to perpetrate a felony, kills another unintentionally and unawares, such killing is murder at common law. If the act by which the unintended death is occasioned is a mere misdemeanor, such killing is manslaughter. An illustration given by Coke, and repeated in all the text-books since, and frequently given in charge to the jury in reported English cases, is this: If a man, shooting at a chicken, merely intending to destroy it, which is a misdemeanor, accidently kills another man, he is guilty of manslaughter. But if he intended to shoot the chicken for the purpose of stealing it, which was a felony, then the accidental killing of the man, though wholly unawares, was murder.

And where a particular intent is requisite to constitute a crime, if a person, in attempting to perpetuate such crime, unintentionally does another act which if done with such particular intent, is a crime, he is guilty. As, where the intent to kill is requisite to constitute murder, if a person attempting to murder one should accidentally kill another, he is guilty of the murder of such other.

The intent must be contemporaneous with the act. If a person breaks and enters a dwelling in the night merely for the purpose of gaining shelter, and subsequently forms the purpose to commit a felony therein, he is not guilty of burglary. If a person wrongfully takes possession of the goods of another, but without any intent to deprive the owner of his property therein, and subsequently forms such intention, he is not guilty of larceny.

time comes,"(*l*) and when the time comes (if it ever does) the act is willed. The willing may succeed the intention instantaneously, or years may intervene between the formation of the intention and the exercise of the will. An example will explain the relation of the two terms more clearly. A. hates B. In consequence of this hatred, A., on meeting B., shoots him dead. Here A. makes up his mind to shoot B. when he meets him; up to this point, as long as the two are separated, A.'s intention only is formed. He meets B. in the road, and carries out his design or intention by pulling the trigger. Now he wills the act; that is, he wishes it in such a way as to cause the motion of his arm and finger.(*m*)

In this example a third element appears. The *motive* of the act is the deadly hatred. Motive may be defined as "that which incites and stimulates to action." It may serve as a clue to the intention; but it is the intention which determines the quality, criminal or innocent, of the act.(*n*)

So much for intention generally. But to make a person a criminal, the intention must be a state of mind forbidden by the law. I utter a forged note, not knowing it to be such, and therefore not intending to defraud. No crime is committed. But if I have such intention, this criminal intention stamps the act with the character of crime.(*o*) The guilty state of mind, or criminal intention, is generally known by the term "*Malice;*" a term which is truly a legal enigma, on account of the many and conflicting senses in which it is used. As synonymous with criminal intention, it is thus necessary to the legal conception of crime. To secure a conviction, as a general rule, malice of this kind must be directly proved. But when the law expressly declares an act to be criminal, the question of intention or

(*l*) Fitz. St. 77.

(*m*) "Though usually both intention and will are found in an act, either or both may be absent. Both are wanting when a man, in a convulsive fit, strikes and kills another. Intention is absent in the case of an infant."—v. Fitz. St. 78.

(*n*) Broom, C. L. 851.

(*o*) v. Fitz. St. 81.

malice need not be considered; at least, except by the judge in estimating the amount of punishment.(*p*) Again, in some cases, this intention is presumed from a circumstance, and it lies on the accused to show that his intention was innocent—*e. g.*, in the case of possession of recently stolen goods.(*q*)

This malice is found not only in cases—

I. Where the mind is *actively* or *positively* in fault, as where there is a deliberate design to defraud, but also—

II. Where the mind is *passively* or *negatively* to blame—that is, where there is culpable or criminal inattention or negligence. A common example of this is manslaughter by a surgeon who has shown gross incompetence in the treatment of the deceased. But here the criminality consists in the willfully incurring the risk of causing loss or suffering to others.(*r*) So that, in fact, the malice is only traced one stage further back. An extreme case of this negative malice is where there is merely the absence of a thought which ought to have been there, as in the non-repair of roads through forgetfulness.

It is usual to lay down that malice is either—

1. *Express*, or *in fact*, as where a person with a deliberate mind and formed design kills another.

2. *Implied*, or *in law*, as where one willfully poisons another, though no particular enmity can be proved; or where one gives a perfect stranger a blow likely to produce death. Here there is a willful doing of a wrongful act without lawful excuse; and the intention is an inference of law resulting from the doing the act.(*s*) The law infers that every man must contemplate the necessary consequences of his own act.(*t*)

Here, and every-where in dealing with malice, there is great danger of deflection into malice with its moral signification, as denoting ill-will or malevolence. In other words, of confounding motive with intention. Malice,

(*p*) Broom C. L. 852. (*q*) v. p. 183. (*r*) Broom, C. L. 854
(*s*) 4 Bl. 199, v. p. 155. (*t*) R. v. Dixon, 3 M. & Sel. 15.

in the sense of malevolence, is not essential to a crime; malice, in its legal signification of criminal intention, is.(*u*)

As we have seen, it is the character of the intention that determines the character of the act; though other considerations, for example, motives, are taken into account, in order to discover the intention. The same act may be wholly innocent, a civil injury, or a crime, according to the intention. For example, A. takes a horse from the owner's stable, without his consent. If he intend to fraudulently deprive the owner of the property and appropriate the horse to himself, he is guilty of the crime of larceny. If he intend to use it for a time, and then return it, it is a trespass or civil injury only. If he take it in due course as distress for rent, he is justified, and not exposed to any ill consequences.(*x*)

But a naked intention is not criminally punishable, except, as it is said, in treason. There must be some carrying out, or attempt to carry out, that intention into action. In other words, the intention is to be inferred from some overt act, or, in the case of a crime of omission, from the absence of some overt act. Thus, although A. has resolutely made up his mind to shoot B. when next he meets him, and confesses this resolution, the law is powerless to deal with him; but directly he does any thing in pursuance of that design, he is within the grasp of the law. The reason for this rule is obvious, namely, the difficulty, or rather impossibility, of proving a mere intention.

If there be present a criminal intention, the prisoner is not exculpated because the results of the steps he takes to carry out that intention are other than those he anticipated or intended. For example, if A., intending to shoot B., shoots C., mistaking C. for B. To such a length is this

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(*u*) "In the use of the word 'malice,' in all cases there is undoubtedly always a lurking reference to some sort of moral depravity, though perhaps only of a temporary sort. But the intangible nature of such an element compels the legislature and the judge to select certain determinate signs as essential characteristics of this depravity."—Amos, Jurisprudence, 305.

(*x*) Broom, C. L. 851.

doctrine extended, that if A. shoots at B.'s poultry, and by accident kills a man, if his intention be to steal the poultry, he will be guilty of murder. The act, viz., the shooting, is willed, and the intention is criminal (and felonious); therefore, the essentials of a crime are furnished, and the result determines what *the* crime is. This is not the only respect in which the gravity and nature of the crime are determined by circumstances over which he has not control. Thus if B. receives a blow from A., and, through the unskillful treatment of the wound by the surgeon, dies, A. will be guilty of manslaughter. The intention is, then, not the sole gauge of criminal liability.

Though a mere intention is not punishable, an *attempt* to commit a crime is itself a crime, and therefore the subject of punishment. That which the law wishes to discover is the intention, and an attempt equally with a completion of the offense will be evidence of this. What is sufficient to constitute an attempt? An attempt may be said to be the doing of any of the acts which must be done in succession before the desired object can be accomplished; or rather, with the limitation that the attempt must be an act directly approximating to the commission of the offense. Thus, procuring a die for coining, was held an act in furtherance of the criminal purpose, sufficiently proximate to the offense; (*y*) but not so the buying a box of matches for setting a stack of corn on fire.(*z*) But the act must have been such that, if no interruption had taken place, the principal offense would have been successfully committed; so that if a person puts his hand into a pocket with intent to steal what is there, and the pocket is empty, he can not be convicted of an attempt to steal.(*a*)

Every attempt to commit a crime is itself an indictable misdemeanor at common law. In some cases, it is specially provided that it shall amount to a felony, *e. g.*, attempt to murder.(*b*)

(*y*) R. *v.* Roberts, 25 L. J. (M. C.) 17.
(*z*) R. *v.* Taylor, 1. F. & F. 511.
(*a*) R. *v.* Collins, 33 L. J. (M. C.) 177.
(*b*) 24 and 25 Vict. c. 100. §§ 11–15.

If on the trial of a person charged with felony or misdemeanor, the jury do not think that the offense was completed, but, nevertheless, are of the opinion that an attempt was made, they may express this in their verdict. The prisoner is then dealt with as if he had been convicted on an indictment for the attempt. But, of course, he is not liable to be prosecuted afterward for the attempt.(*c*) (1)

As a rule, attempts are punished less severely than the corresponding consummate crimes, though the mischief may be as great in the one case as the other. It is with a view to cases in which the complete offense is more mischievous that the distinction is made, so as to give the person a *locus penitentiæ* before the consummation. It may be noticed that this consummation is prevented sometimes by the penitence of the party, sometimes by extrinsic causes.(*d*)

(*c*) 14 and 15 Vict. c. 100, § 9. (*d*) Austin, 1098.

(1) The same in Iowa, if the attempt is punishable. Rev. Stat. 1873, p. 689, § 4465; Ohio, 74 Ohio L. 352; Kentucky, Crim. Code, § 263.

CHAPTER IV.

PERSONS CAPABLE OF COMMITTING CRIMES.

EVERY man must be presumed to be responsible for his acts until the contrary is clearly shown. If an act ordinarily falling within the scope of the criminal law be committed, the law presumes that it was done willfully and with malicious intent. Therefore it lies on the accused to rebut this presumption.

There are certain exemptions from criminal responsibility, or rather, under certain circumstances, acts which would otherwise be criminal, on some special ground are not deemed so. The foregoing examination of the essential elements of crime enables us to determine what is the nature of these exceptions; inasmuch as they are founded, as a rule, on the absence of one of those essentials. In one or two instances, however, other considerations, either of policy or well-advised lenity, are entertained, *e. g.*, in the case of crimes committed by ambassadors.

The several instances of irresponsibility may be reduced to the following classes:

1. Absence of criminal intention or malice, including—
   Insanity; infancy; ignorance (mistake).
2. Absence of will, *i. e.*, the act is purely involuntary—
   Misfortune, etc.; physical compulsion.
3. Instant and well-grounded fear, stronger than the fear naturally inspired by the law (*e*)—
   Fear of excessive unlawful harm; coercion of married women.

In each of these cases (1–3) the fear of punishment is not calculated to act upon the person so as to deter him, or to deter others by making him an example; therefore the punishment would be inoperative, and worse than useless.

4. When an act, under ordinary circumstances criminal,

(*e*) Austin, 1092, etc.

is denuded of that character, inasmuch as it is directly authorized by the law—

In pursuance of legal duty, *e. g.*, the sheriff hanging a criminal.

In pursuance of legal right, *e. g.*, slaying in self-defense.

Here, as in the first class, there is no criminal intention.

Each of these grounds of exemption must now be dealt with.

Insanity.—With regard to no subject in criminal law is there so much obscurity and uncertainty as on the question of the responsibility or irresponsibility of a prisoner when the state of his mind at the time of the commission of the act is the point at issue. It has often been asserted, and not without a considerable degree of truth, that the acquittal or conviction of a prisoner, when insanity is alleged, is more or less a matter of chance. The subject is one on which the views taken by medical men differ most widely from those taken by lawyers; and as the former are generally the most important witnesses in cases of alleged insanity, the confusion is by no means diminished.(*f*)

Two classes of mental alienation are usually recognized:

1. *Dementia naturalis*, or *a nativitate*—in other words, *idiocy*, or continuous weakness of mind from birth, without lucid intervals; a person deaf and dumb from birth is by presumption of law an idiot, but it may be shown that he has the use of his understanding.

2. *Dementia accidentalis*, or *adventitia*—usually termed *insanity*, in the narrower signification. The mind is not naturally wanting or weak, but is deranged from some cause or other. It is either *partial* (insanity upon one or more subjects, the party being sane upon all others) or *total*. It is also either *permanent* (usually termed *madness*) or *temporary* (the object of it being afflicted with his disorder at

(*f*) "There is great difference of opinion as to the cause of the uncertainty; the lawyers asserting that it is owing to the fanciful theories of medical men, who never fail to find insanity when they earnestly look for it, the latter protesting that it is owing to the unjust and absurd criterion of responsibility which is sanctioned by the law"—Maudsley's Responsibility in Mental Disease (1874), 101.

certain periods only, with lucid intervals), which is usually denominated *lunacy*.(*g*)

Three stages in the history of the law of insanity may be discerned. The first, outrageous as it was, may be illustrated by the following dictum of an English judge: A man who is to be exempted from punishment "must be a man that is totally deprived of his understanding and memory, and doth not know what he is doing, no more than an infant, than a brute, or a wild beast."(*h*) The second stage regarded as the test of responsibility the power of distinguishing right from wrong in the abstract.(*i*) The third stage, unhappily, is that in which we live; though common sense may soon inaugurate a fourth. The existing state of doctrines dates from the trial of McNaughten, in the year 1843.(*k*)

McNaughten's case.—Certain questions were propounded by the House of Lords to the judges. The substance of their answers was to the following effect: "To establish a defense on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong."(*l*) Thus the question of knowledge of right or wrong, instead of being put generally and indefinitely, is put in reference to the *particular act* at the *particular time* of committing it.(1)

(*g*) v. Bac. Abr. Idiots. As to *dementia affectata*, or drunkenness, v. p. 27.

(*h*) R. *v.* Arnold, 16 St. Tr. 764.

(*i*) R. *v.* Bellingham, Coll. 636.

(*k*) 10 Cl. & Fin. 200; 1 C. & K. 130.

(*l*) Cf. Alison's Principles of Criminal Law of Scotland, pp. 645, 654, "The insanity must have been of such a kind as entirely to deprive the prisoner of the use of reason, *as applied to the act in question*, and of the knowledge that he was doing wrong in committing it."

(1) The medical profession is concerned with insanity as a disease, and the tendency is to regard it as purely physical—as a disease, injury, or defect of the brain. The law is concerned with insanity as it affects the responsibility of a person for his acts, and regards it as a

As to *partial* insanity, that is, when a person is sane on all matters except one or more, the judges declared that

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mental or psychical derangement. Chief Justice Shaw, in Commonwealth *v.* Rogers, 7 Metc. 500, defines insanity as recognized by the law, as 1. A want of capacity and reason to enable a person to distinguish between right and wrong, and understand the nature, character, and consequences of his act, and mental powers sufficient to apply that knowledge to his own case; 2. A delusion or real and firm belief of the existence of a fact which is wholly imaginary, and under which he does an act which would be justifiable if such fact existed; 3. An uncontrollable impulse, which is the result of mental disease. Chief Justice Gibson, of Pennsylvania, in Commonwealth *v.* Mosler, 4 Barr 267, prescribes substantially the same. The insanity of uncontrollable impulse is propounded in criminal prosecutions mainly under the forms of homicidal mania and kleptomania, though several other forms are recognized by medical writers. A voluntary vicious indulgence, which grows into an inveterate habit, beyond control, is not insanity. It must be an irresistible impulse, "which is the result of mental disease." In The People *v.* Sprague, 2 Parker's Crim. Cas. 43, where the defense of kleptomania was successfully pleaded, it was proved that insanity had been hereditary for several generations in the family of the defendant, and had been developed in him by an injury to his head, though it was manifested only in an uncontrollable propensity to a singular species of theft.

Inability to distinguish between right and wrong, as to the act charged as a crime, is the generally accepted, and in some states the exclusively accepted, test of such insanity as exempts from criminal responsibility. Commonwealth *v.* Rogers, 7 Metc. (Mass.), 500; State *v.* Johnson, 40 Conn. 136; Willis *v.* The People, 32 N. Y. 717; Flannigan *v.* The People, 52 N. Y. 467; State *v.* Spencer, 1 Zabriskie, 196; Commonwealth *v.* Mosler, 4 Barr. 267; Ortwein *v.* Commonwealth, 76 Penn. St. 414; McAllister *v.* State, 17 Ala. 434; Bovard *v.* State, 30 Miss. 600; Dove *v.* State, 3 Heiskell (Tenn.), 348; Loeffner *v.* State, 10 Ohio St. 598; Blackburn *v.* State, 23 Ohio St. 146; Hopps *v.* The People, 31 Ill. 385; State *v.* Huting, 21 Mo. 476; People *v.* McDonnell, 47 Cal. 134; United States *v.* McGlue, 1 Curtis C. C. 8.

The insanity of delusion is recognized in Commonwealth *v.* Rogers, 7 Metc. (Mass.), 500.

The insanity of uncontrollable impulse produced by mental disease is recognized in Commonwealth *v.* Rogers, 7 Metc. (Mass.), 500; State *v.* Johnson, 40 Conn. 136; Commonwealth *v.* Mosler, 4 Barr. 267; People *v.* Sprague, 2 Parker's Crim. Cas. 43; Scott *v.* Commonwealth, 4 Metc. (Ky.), 227; Smith *v.* Commonwealth, 1 Duvall, 225; Kriel *v.* Commonwealth, 5 Bush, 365; Shannahan *v.* Commonwealth, 8 Bush, 464; Stevens *v.* State, 31 Ind. 485; State *v.* Felter, 25 Iowa, 67.

The Supreme Court of New Hampshire, in State *v.* Pike, 49 N. H.

"he must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real. For example, if, under the influence of his delusion, he supposes another man to be in the act of attempting to take away his life, and he kills that man, as he supposes, in self-defense, he would be exempt from punishment. If his delusion was that the deceased had inflicted a serious injury to his character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment."(*m*) After laying down, as above, what may be called the "particular right and wrong theory," they abandon it here, and also in another answer, where, still dealing with partial delusions, they express their opinion that "notwithstanding the party accused did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some public benefit, he is nevertheless punishable if he knew, at the time of committing

399, and State *v.* Jones, 50 N. H. 369, discarded all tests of insanity as rules of law. It is there held that insanity is a mental disease; neither delusion nor knowledge of right and wrong, etc., is, as a matter of law, a test of mental disease; but all symptoms and tests of mental disease are purely matters of fact, to be determined by the jury; whether the defendant had a mental disease, and whether the act charged as a crime was the product of such disease, are the decisive questions, and they are questions of fact for the jury. In harmony with this, the same court has adopted, as a rule of evidence, that it is not competent for a witness who is not an expert to give his opinion as to the sanity of the defendant, though such opinion is based upon the witness' observation of the appearance and conduct, and the facts so observed are in evidence. Boardman *v.* Woodman, 47 N. H. 120; State *v.* Pike, 49 N. H. 399.

The student is referred also to 1 Wharton & Stille's Medical Jurisprudence, Browne's Medical Jurisprudence of Insanity, Reese's American edition of Taylor's Medical Jurisprudence, and the note to Commonwealth *v.* Rogers, 1 Leading Crim. Cas. 100.

(*m*) "Here is an unhesitating assumption that a man, having an insane delusion, has the power to think and act in regard to it *reasonably*; that, at the time of the offense, he ought to have and exercise the knowledge and self-control which a sane man would have and exercise, were the facts with respect to which the delusion exists real; that he is, in fact, bound to be reasonable in his unreason, sane in his insanity."—Maudsley, 97.

such crime, that he was acting contrary to the law of the land."(*n*)

It has been held that an apparent absence of motive for the deed is not any ground for inferring an irresistible and insane impulse; and that though there be an irresistible impulse, if there be no real delusion as to any fact, it affords no defense.(*o*) Why a man should be punished for what he can not resist, it is, perhaps, hard to comprehend.

As to *medical* evidence on the question of insanity—a witness of medical skill may be asked whether, assuming certain facts, proved by other witnesses, to be true, they, in his opinion, indicate insanity. But he can not be asked, although present in court during the whole trial, whether from the evidence he has heard he is of opinion that the prisoner, at the time he committed the alleged act, was of unsound mind; for such a question, unlike the previous one, involves the determination of the truth of the evidence, which it is for the jury to determine.(*p*) (1) .

The law presumes sanity; and, therefore, the burden of the proof of insanity lies on the defense.(2) Even in the case of an acknowledged lunatic, the offense is presumed to have been committed in a lucid interval, unless the contrary be shown. It is for the petty jury to decide whether a case of insanity, recognized as such by the law, has been made out. The grand jury have no right to ignore a bill on the ground of insanity. The jury are obliged to attend

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(*n*) For strictures on these principles of "exquisite inhumanity," see remarks of Judge Ladd in State *v.* Jones, 50 N. H. 369.

(*o*) R. *v.* Haynes, 1 F. & F. 666; R. *v.* Barton, 3 Cox, 275.

(*p*) R. *v.* Frances, 4 Cox, 57. See also McNaughten's Case.

(1) In the United States, generally, unprofessional witnesses may give in evidence their opinion as to the sanity of the defendant, provided they have been personally acquainted with him, and they also give in evidence the facts upon which this opinion is based. But in Maine (Wyman *v.* Gould, 47 Maine, 159), New Hampshire (Boardman *v.* Woodman, 47 N. H. 120), Massachusetts (Commonwealth *v.* Fairbanks, 2 Allen, 511), and Mississippi (Caleb *v.* State, 38 Miss. 722), it is held, on the contrary, that persons not experts can not so testify.

(2) See note, *post* p. 362, on burden of proof.

to the directions of the judge as to what is called the law on the subject, but which is rather an erroneous opinion as to a matter of fact. There seems to be no sound reason for withdrawing any part of the question of insanity from the jury—a thing which is done when the artificial test of responsibility is propounded to them.(*q*) When, on the part of the defense, the insanity of the prisoner at the time of the commission of the offense is given in evidence, and the jury acquit him, they must find specially whether he was insane at the time of the commission of the offense, and declare whether they acquit him on that ground. If they so acquit him on the ground of insanity, the court will order him to be kept in proper custody till the queen's pleasure be known; and the queen may order the confinement of such person during her pleasure.(*r*) So if a person indicted is insane, and upon arraignment is found insane by a jury impaneled to discover his state of mind, so that he can not be tried; or if on his trial, or when brought up to be discharged for want of prosecution, he appears to the jury to be insane, the court may record such finding, and order him to be kept in custody till the queen's pleasure be known.(*s*)

In accordance with the dictates of humanity no criminal proceedings can be taken against a man while he is *non compos mentis*. Thus, if a man commit murder and become insane before arraignment, he can not be arraigned; if after trial before judgment, judgment can not be pronounced; if after judgment before execution, execution will be stayed.(*t*)

Drunkenness.—Drunkenness is sometimes termed *dementia affectata*—acquired madness. A state of voluntary in-

(*q*) "If the tests of insanity are matters of law, the practice of allowing experts to testify what they are should be discontinued; if they are matters of fact, the judge should no longer testify without being sworn as a witness, and showing himself qualified to testify as an expert."—Judge Doe in State *v.* Pike, 49 N. H. 399.

(*r*) 39 and 40 Geo. 3, c. 4, § 1; 3 and 4 Vict., c. 54, § 3.

(*s*) 39 and 40 Geo. 3, c. 94, § 2.

(*t*) 1 Hale, P. C. 34.

toxication is not any excuse for crime.(*u*) It is true that the sanctions of the law can not be supposed to exert an equal influence on the mind and conduct of a person in this state; but the initiation of the crime may be said to date back to the time when the offender took steps to deprive himself of his reason. It is evident that if drunkenness were allowed to excuse, the gravest crimes might be committed with impunity by those who either counterfeited the state or actually assumed it.

It would be incorrect to say that the consideration of drunkenness is never entertained in the criminal law. Though it is no excuse for crime, yet it is sometimes an index of the quality of an act. Thus, it may be taken into account by the jury when considering the motive or intent of a person acting under its influence; for example, on the question whether a person who struck a blow was excited by passion, or acted from ill-will; whether expressions used by the prisoner were uttered with a deliberate purpose, or were merely the idle expressions of a drunken man.(*x*) So M. could not have *intended* suicide if she were so drunk that she did not know what she was doing.(*y*)

Of course if the drunkenness be involuntary—as, for example, if it be by the contrivance of the prisoner's enemies—he will not be accountable for his action while under that influence. Also, if drunkenness has become habitual and confirmed, so as to produce the disease of insanity, this insanity, equally with other kinds of mental disease, may be pleaded in defense.

[The note to United States *v.* Drew, 1 Leading Criminal Cases (2 ed.), 131, presents a full discussion of the cases upon drunkenness considered as a defense in a criminal prosecution. The note closes with the following conclusions: "*First.* That fixed insanity, or *delirium tremens*, though the result of voluntary dissipation, is as much an excuse for crime as any other form of insanity. *Second.* That voluntary intoxication, not depriving the party of all knowledge of

(*u*) v. Pearson's Case, 2 Lew. C. C. 144.
(*x*) R. v. Thomas, 7 C. & P. 817.
(*y*) R. v. Moore, 3 C. & K. 319

what he was doing, is not itself an excuse for any crime. *Third.* That when some specific intent *must be proved*, in order to constitute a particular crime, the jury may consider the fact and degree of intoxication in determining whether the party had capacity to form such intent. *Fourth.* That intoxication will not reduce an *unprovoked* homicide from murder to manslaughter; but if a *legal* provocation has been given, it may be considered in determining whether, in fact, the party acted upon such provocation, or from malicious motives, in giving the fatal blow."]

Infancy.—Infancy can be used in defense only as evidence of the absence of criminal intention, though there are certain presumptions of the law on the subject, some of which may, some of which may not, be rebutted.

The age of discretion, and therefore of responsibility, varies according to the nature of the crime. What the law technically terms "infancy" does not terminate till the age of twenty-one is reached; but this is not the "infancy" which is the criterion in the criminal law. Two other ages have been fixed as points with reference to which the criminality of an act is to be considered.

Under the age of *seven*, an infant can not be convicted of a felony; for until he reaches that age he is presumed to be *doli incapax;* and this presumption can not be rebutted by the clearest evidence of a mischievous discretion.(*z*)

Between *seven* and *fourteen*, he is still, *prima facie*, deemed by law to be *doli incapax;* but this presumption may be rebutted by clear and strong evidence of such mischievous discretion,(*a*) the principle of the law being *malitia supplet ætatem.* Thus, a boy of the age of ten years was hanged for killing his companion; he having manifested a consciousness of guilt, and a discretion to discern between good and evil, by hiding the body.(*b*) There is one ex-

(*z*) A *præsumptio juris et de jure*, v. p. 376.

(*a*) Ibid.

(*b*) 1 Hale, P. C. 26, 27; v. York's Case, Fost 70.

ception to this rule, grounded on presumed physical reasons. A boy under the age of fourteen can not be convicted of rape or similar offenses, even though he has arrived at the full state of puberty.(1) He may, however, be convicted as principal in the second degree.

Between *fourteen* and *twenty-one*, an infant is presumed to be *doli capax*, and accordingly, as a rule, may be convicted of any crime, felony, or misdemeanor. But this rule is subject to exceptions, notably in the case of offenses consisting of mere non-feasance; as, for example, negligently permitting felons to escape, not repairing highways, etc. It is given as a reason for the exemption in cases of the latter character that, not having the command of his fortune till twenty-one, the person wants the capacity to do those things which the law requires.(*c*)

Though, as we have seen, infants who have arrived at years of discretion are not to be allowed to commit crimes with impunity, we shall find that in certain cases the law deals with juvenile offenders in an exceptional way, in order, if possible, to prevent their becoming confirmed criminals.

Ignorance (including mistake)—Two kinds of ignorance must be distinguished—Ignorance of law—Ignorance of fact. It is a leading principle of English law that ignorance of law in itself will never excuse. Though it is implied in some of the excuses of which we have treated, *e. g.*, infancy, the ignorance of the law is not the ground of exemption.(*e*) It is no defense for a foreigner charged with a crime committed in England that he did not know he was doing wrong, the act not being an offense in his own country.(*f*)

Ignorance or mistake of fact will or will not excuse, according as the original intention was or was not lawful. For example, if a man, intending to kill a burglar in his house, kill his servant, he will not be guilty of an offense.

(*c*) 4 Bl. 22.

(*e*) v. Austin, 496. (*f*) R. *v.* Esop, 7 C. & P. 456.

(1) *Contra* in Ohio. There a boy under fourteen, though presumed to be incapable, may be proved to have actually arrived at puberty, and, in such case, may be convicted. Williams *v.* State, 14 Ohio, 222.

But if intending to do grievous bodily harm to A., he, in the dark, kill B., he will be guilty of murder.

The cases we have been noticing are those in which the exemption from the normal liability is grounded on the absence of criminal intention or malice. Those in which the ground of exemption is absence of will, or, in other words, involuntary acts, require very little consideration.

Accident (including misfortune, mishap, etc.)—To be valid as an excuse, the accident must have happened in the performance of a lawful act with due caution. For example, A., properly pursuing his work as a slater, lets fall a slate on B.'s head; B. dies in consequence of the injury. Here A. will not be liable; but it would have been otherwise had he at the time been engaged in some criminal act; or if he had not exercised proper skill or care. We shall find cases of this description most frequently in drawing the line between culpable and excusable homicide.

Physical compulsion—as if A. kills B. with C.'s hand.

The third division comprises cases where the act is done under a fear stronger than that which the law inspires.

Fear of excessive and unlawful harm.—When a person is driven to commit an offense by such threats and menaces of personal violence from others as induce a well-grounded apprehension of present death or grievous bodily harm, in some cases he is excused. The danger must threaten his person; it will not be sufficient if it only endangers his property. And this plea of *duress per minas* will not be of avail in every crime. Thus, though a man be violently assaulted, and has no other possible means of escaping death but by killing an innocent person, if he commit the act he will be guilty of murder; for he ought rather to die himself than escape by the murder of an innocent man. But in such case he may kill his assailant.(*g*) Questions of this sort are especially likely to occur when persons are compelled to join in a rebellion or riot.(*h*)

State of married women.—In cases of *felony*, if a married

(*g*) 1 Hale, P. C. 51.

(*h*) R. *v.* McGrowther, Fost. 13; 9 St. Tr. 566.

woman commits the crime in the presence of her husband, the law presumes that she acts under his coercion, and therefore excuses her from punishment. But this exemption is not allowed in all felonies, though it seems unsettled where the line is drawn. It appears that the wife is liable in treason, murder, manslaughter, and robbery.(*i*) In no case is she excused if her husband be not present, not even if the act be done by his order.(*k*) The presumption of law may be rebutted by evidence. Thus, if it can be shown that she acted voluntarily, at least if she took a principal part in the commission of the crime, she will be convicted, although her husband were present.(*l*)

In cases of *misdemeanor*, the prevailing opinion seems to have been that the wife is responsible for her acts, although her husband be present at the commission. However, in recent cases, this has been doubted, and the rule prevailing in felony applied.(*m*) At any rate, the exemption does not extend to those offenses relating to domestic matters and the government of the house, in which the wife may be supposed to have a principal share, as for keeping a disorderly or gaming-house.

It requires the co-operation of two, at least, to constitute a conspiracy. Of this crime, therefore, a husband and wife can not by themselves be convicted, inasmuch as in the eye of the law they are regarded as one person. So a wife can not be convicted of stealing her husband's goods; nor of harboring him when he has committed a crime.

This relation of wife to the husband is the only one which the law recognizes as a shield from criminal punishment. The other private relations, parent and child,

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(*i*) R. *v.* Manning, 2 C. & K. 903; R. *v.* Cruse, 8 C. & P. 541; 1 Hale, P. C. 45–48; 1 Hawk, c. 1, § 11; 1 Russ. 33, Starkie on Evidence, tit. Husband and Wife; [Davis *v.* State, 15 Ohio, 72.]

(*k*) R. *v.* Morris, R. & R. 270; [Commonwealth *v.* Murphy, 2 Gray, 513.]

(*l*) R. *v.* Torpey, 12 Cox, 45; [Wagener *v.* Bill, 19 Barbour, 321; Quinlan *v.* The People, 6 Parker, C. C. 1; City Council *v.* Van Roven, 2 McCord, 465.]

(*m*) R. *v.* Price, 8 C. & P. 19; R. *v.* Torpey, *supra*.

master and servant, will not excuse, nor extenuate the commission of any crime; either child or servant being liable notwithstanding the command or coercion of the parent or master.

Certain exceptional cases, where the ordinary rules as to capability of committing crime do not entirely prevail, require a brief notice.

The sovereign.—The sovereign can do no wrong; therefore he is not amenable to the ordinary criminal courts of his kingdom. Blackstone forbids us even to imagine such delinquency on the part of the sovereign. "He is not under the coercive power of the law; which will not suppose him capable of committing a folly, much less a crime. We are, therefore, out of reverence and decency, to forbear any idle inquiries of what would be the consequence if the king were to act thus and thus; since the law deems so highly of his wisdom and virtue, as not even to presume it possible for him to do any thing inconsistent with his station and dignity; and therefore has made no provision to remedy such a grievance."(*n*) Inasmuch as it is presumed that he can do no wrong, although he commands an unlawful act to be done, *e. g.*, an unlawful arrest, the instrument is not indemnified, but is punishable.

Corporations.—Even corporations aggregate, such as railway companies, may be indicted by their corporate names, for breaches of duty; whether such breaches consist of wrongful acts, *e. g.*, obstructing highways; or wrongful omissions, *e. g.*, neglecting to repair bridges(*o*). A corporation may also be indicted by its corporate name and fined for an assault committed or a libel published by its order.(*p*) (1)

(*n*) 4 Bl. 33.

(*o*) R. *v.* Birmingham and Gloucester Railway Co., 9 C. & P. 469; 2 Q. B. 47.

(*p*) Eastern Counties Co. *v.* Broom, 6 Exch. 314.

(1) It is now held in the United States, contrary to the earlier opinion, that corporations are indictable at common law for misfeasance as well as non-feasance. Commonwealth *v.* New Bedford Bridge, 2

Aliens.—Foreigners who commit crimes in England are punishable exactly as if they were natural-born subjects. It is no defense on behalf of a foreigner that he did not know he was doing wrong, the act not being an offense in his own country. Though this is no defense, it may mitigate the punishment.(*q*)

Ambassadors.—Different views, materially conflicting with each other, have been held as to the criminal liability of ambassadors and their suites. Some writers maintain that for no offense, whether it be against the life, person, or property of an individual, is an ambassador amenable to the criminal law of the country to which he is sent.(*r*) Others assert that though he is not punishable for crimes made such by the laws of the particular country, he is so for any great crimes which must be such in any system. Or, as it is sometimes expressed, he is punishable for *mala in se*, but not for acts which are merely *mala quia prohibita*. Thus, an ambassador might be convicted for murder or rape, but not for smuggling. The more probable and reasonable course seems to be to request the recall of the offender by his own state, with or without an expression of opinion that the offender should be punished in his own country. If this be refused, the ambassador might be dismissed, and pressure brought to bear on the other state to induce the latter to put him on his trial.

There is one class of offenses which stand on a different footing, namely, offenses affecting the existence and safety of the state. For a direct attempt against the life of the sovereign, it is said that the offender would be directly pun-

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Gray, 339; State *v.* Vermont Cent. R. R. Co., 27 Vt. 103; State *v.* Morris and Essex R. R. Co., 23 N. J. Law (3 Zabriskie), 360. The word "person" includes corporations or artificial persons as well as natural persons But in states where there is no common-law criminal jurisdiction, and where the statutes have provided no process for bringing the defendant into court but *capias*, the word "person" is held not to include corporations. State *v.* Cin. Fertilizer Co., 24 Ohio St. 611; State *v.* O. & M. R. R. Co., 23 Ind. 362. Corporations can now be indicted in Ohio. 74 Ohio L. 262.

(*q*) R. *v.* Esop, 7 C. & P. 456.

(*r*) Phillimore's International Law, vol. 2, c. 7

ishable by the state.(s) But, at any rate, in this and other offenses against the government, the state might demand the punishment of the offender by the foreign state; and if this demand were not complied with, might treat him as a public enemy, and demand satisfaction from that foreign state. The matter would then pass from the province of law to that of politics.

(s) 1 Hale, P. C. 96–99; Fost. 187, 188.

CHAPTER V.

PRINCIPALS AND ACCESSORIES.

THOSE who are implicated in the commission of crimes are either *principals* or *accessories*. This distinction is based on the consideration, whether the party was present or absent at the commission. It is recognized in felonies alone.

Principals (*i. e.*, those present) are either—

Principals in the first degree, or principals in the second degree.

Accessories are either—

Accessories before the fact, or accessories after the fact.

Of these, in their order:

Principal in the first degree.—He who is the actor or actual perpetrator of the deed. It is not necessary that he should be actually present when the offense is consummated; thus, one who lays poison or a trap for another, is a principal in the first degree. Nor need the deed be done by the principal's own hands; for it will suffice if it is done through an innocent agent, as for instance, if one incites a child or a madman to murder.

Principal in the second degree.—One who is present, aiding and abetting at the commission of the deed.(*t*) This presence need not be actual; it may be constructive. That is, it will suffice if the party has the intention of giving assistance, and is sufficiently near to give the assistance; as when one is watching outside, while others are committing a felony inside, the house. There must be both a participation in the act and a community of purpose (which must be an unlawful one) at the time of the commission of the crime. So that, as to the first point, mere presence or mere

(*t*) Principals in the second degree are frequently termed *aiders and abettors*; sometimes also *accomplices*. The latter term, however, may include all *participes criminis*.

neglect to endeavor to prevent a felony will not make a man a principal; as to the second, acts done by one of the party, but not in pursuance of the arrangement, will not render the others liable.

The distinction between principals of the first and of the second degree is not a practically material one, inasmuch as the punishment of offenders of either class is generally the same.

Accessories are those who are not (a) the chief actors in the offense, nor (b) present at its performance, but are some way concerned therein, either before or after the fact committed.(*u*)

Accessory before the fact.—One who, being absent at the time when the felony is committed, yet procures, counsels, commands, or abets another to commit a felony.(*x*) This may be done not only by direct command or counsel, but also by expressing assent or approbation of the felonious design of another. But the bare concealment of a felony about to be committed does not make an accessory. It is not necessary that there should be any direct communication between the accused and the principal; as if A. requests B. to procure the services of C. in order to murder D.

The accessory will be answerable for all that ensues upon the execution of the unlawful act commanded, at least for all probable consequences; as, for instance, if A. commands B. to beat C., and he beats him so that he dies, A. is accessory to the murder. But if the principal intentionally commits a crime essentially different from that commanded, the person commanding will not be answerable as accessory for what he did not command. Thus, if A. commands B. to break into C.'s house, and B. sets fire to the house, A. can not be convicted of the arson. But a mere difference in the mode of effecting the deed, or in some other collateral matter, will not divest the commander of the character of accessory if the felony is the same in substance. Thus, if A. commands B. to kill C. by poison, and

(*u*) 4 Bl. 35. (*x*) 1 Hale, P. C. 615.

he kills him with a sword, A.'s command suffices to make him an accessory.

With regard to manslaughter: As a rule the offense is sudden and unpremeditated, and this view of the nature of the crime having been taken, it has been said that there can be no accessory before the fact in manslaughter. But in many cases there is deliberation, though it is not accompanied by an intention to take away life. It is easy to present a case in which there may be an accessory before the fact to manslaughter. A. counsels B. to mischievously give C. a dose of medicine merely to make him sick, and C. dies in consequence; A. is guilty as an accessory before the fact to manslaughter.(*y*)

As to the trial of those who command, counsel, or procure the commission of a felony: Until a recent date it was the rule that such a person could not be tried without his own consent, except at the same time with the principal, or after the principal had been tried and found guilty. He was merely an accessory, and therefore he could not be tried before the fact of the crime was established. Now two courses are open to the prosecution; either (a) to proceed, as formerly, against the person who counsels, etc., as an accessory before the fact with the principal felon, or after his conviction; or (b) to indict the counsellor for a substantive felony (for to that his offense is declared by the statute to amount), and this may be done whether the principal has or has not been convicted, and although he is not amenable to justice. The punishment in either case is the same. If one of these two modes has been adopted, of course the offender can not be afterward prosecuted in the other.(*z*) It is also provided that an accessory before the fact may be indicted, tried, convicted, and punished in all respects as if he were a principal felon.(*a*) To convict of the substantive felony under this act, it is still necessary to prove that the principal deed has actually been committed. Soliciting and exciting to the commis-

(*y*) R. *v.* Gaylor, 7 Cox, 253.
(*z*) 24 and 25 Vict. c 94, § 2.
(*a*) 24 and 25 Vict., c. 94, § 1.

sion, if the deed is not committed, is only a misdemeanor.(1)

Accessory after the fact.—One who, knowing a felony to have been committed by another, receives, relieves, comforts, or assists the felon.(*b*) What is required to make a person an accessory after the fact? (a) There must have been some felony committed and completed; (b) the party charged must have had notice, direct or implied, at the time he assists, etc., the felon, that he had committed the felony; (c) he must have done some act to assist the felon personally. It will suffice if there has been any assistance given in order to hinder the felon's apprehension, trial, or punishment; for example, concealing him in the house, supplying him with horse or money to facilitate his escape. But merely suffering the principal to escape will not make the party an accessory after the fact.(*c*)

Receiving stolen goods, knowing them to have been stolen is generally treated as a separate offense; the receiver being convicted of a felony, misdemeanor, or summary offense, according as the stealing of the property is a felony, misdemeanor, or offense punishable on summary conviction.(*d*) If, however the stealing, obtaining, etc., is a felony, the receiver may be indicted either as an accessory after the fact, or for a substantive felony.(*e*)

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(1) In states where there is a common-law jurisdiction as to crimes, the accessory can be tried only jointly with the principal, or after the conviction of the principal. Able *v.* Commonwealth, 5 Bush, 698; Tully *v.* Commonwealth, 11 Bush, 154. But in states where there are none but statutory crimes, the accessory, when guilty, is guilty of a substantive crime, and can therefore be tried, though the principal has not been indicted. Noland *v.* State, 19 Ohio, 131; Brown *v.* State, 18 Ohio St. 496; Ulmer *v.* State, 14 Ind. 52. But, in Indiana, an accessory can not be convicted after the alleged principal has been acquitted. McCarty *v.* State, 44 Ind. 214. In Michigan, the distinction between accessories before the fact and principals, in felony, is abolished, and all concerned in the commission of a felony, as in a misdemeanor, are made principals by statute. 2 Rev. Stat. (1872), 2173, § 7934.

(*b*) 1 Hale, P. C. 618.

(*c*) 1 Hale, P. C. 618, etc.; R. *v.* Chapple, 9 C. & P. 355.

(*d*) v. p. 218.

(*e*) 24 and 25 Vict., c. 96, § 91.

We have noticed (*f*) that, as a rule, the wife is protected from criminal liability for acts committed in the presence of her husband. Much more, then, can she claim this immunity when the offense with which she is charged is that of receiving and assisting her husband. There is no exemption in respect of any other relation. Even the husband may be convicted for assisting his wife.

An accessory after the fact to a felony may be tried in the same manner as an accessory before the fact; that is, either as an accessory with the principal, or after his conviction, or as for a substantive felony, independently of the principal.(*g*) But where an indictment contains two counts, the first charging the accused person as principal in a felony, the second charging him as accessory after the fact to the same felony, the prosecution must elect upon which count they will proceed.(*h*)

He is, in general, punishable with imprisonment for any term not exceeding two years (with or without hard labor), and may also be required to find security for keeping the peace, or, in default, to suffer additional imprisonment for a period not exceeding one year.(*i*) But an accessory after the fact to murder may receive sentence of penal servitude for life, or for any less term to five years or imprisonment not exceeding two years.(*j*) A receiver of stolen goods is liable to a maximum punishment of penal servitude for fourteen years.(*k*)

It has been observed that the distinction of principals and accessories is found only in the case of felonies.

As to *treason:* Both every kind of incitement which in a felony would make a man an accessory before the fact, and every kind of assistance which would make him an accessory after the fact, in treason will make the offender a principal traitor. This rule is said to exist *propter odium delicti.*

As to *misdemeanors:* Those who aid or counsel the com-

(*f*) v. p. 32.
(*g*) 24 and 25 Vict., c. 94, § 3.
(*h*) R. *v.* Brannon, 14 Cox, 394
(*i*) 24 and 25 Vict., c. 94, § 4.
(*j*) 24 and 25 Vict., c. 100, § 67; 27 and 28 Vict., c. 47, § 2.
(*k*) 24 and 25 Vict., c. 96, § 91.

mission of the crime are dealt with as principals;(*l*) those who merely assist after the misdemeanor has been committed are not punishable, unless indeed the act amount to the misdemeanor of rescue, obstructing the officer, or the like.(*m*)

The following outline of the present state of the law on the subject of degrees of guilt may serve to place the matter in a clearer light:

There are no accessories in treason or misdemeanors, only in felonies.

Principals, whether of the first or second degree, are virtually dealt with in the same way.

Accessories, whether before or after the fact, may be treated as such, or as charged with a substantive felony; but if once tried in either of these capacities, the other may not be afterward resorted to.

Accessories before the fact receive the same punishment as principals; accessories after the fact generally imprisonment not exceeding two years.

In the following imaginary case examples of each of the four kinds of participation in a crime will be found. A. incites B. and C. to murder a person. B. enters the house and cuts the man's throat, while C. waits outside to give warning in case any one should approach. B. and C. flee to D., who, knowing that the murder has been completed, lends horses to facilitate their escape. Here B. is principal in the first degree, C. in the second degree, A. is accessory before the fact, D. after the fact.

(*l*) 24 and 25 Vict., c. 94, § 8.

(*m*) R. v. Greenwood, 21 L. J. (M. C.) 127.

BOOK II.

CLEARLY it will be advisable to adopt some logical plan in treating of the various offenses which come under the cognizance of tribunals of criminal jurisdiction. Though, of course, crimes which primarily affect the state or the public also affect the individuals who constitute that state or public; and crimes which in their immediate effect wrong individuals indirectly or are productive of public evil, yet the division of crimes into *Offenses of a Public Nature* and *Offenses of a Private Nature* or *against Individuals*, may be resorted to without fear of confusion. There are other possible modes of arrangement; for example, according to the different tribunals before which, or the different processes by which, the crimes are prosecuted (as in the French penal code), according to the punishments with which the crimes are visited, etc.

Taking as the main division that indicated above, the general order will be determined, as far as possible, by the wideness of the province of the various crimes, thus commencing with offenses against the law of nations.

PART I.

OFFENSES OF A PUBLIC NATURE.

CHAPTER I.

OFFENSES AGAINST THE LAW OF NATIONS.

CERTAIN offenses are regarded as violating those unwritten laws which are admitted by nations in general, and which it is their duty to have enforced. It must not be assumed that any state is at liberty to take upon itself the punishment of an offense against the law of nations, if such offense is committed within the territories of a foreign jurisdiction. The most that it can do in such case is to demand that justice be done by the foreign state; and if such state implicates itself in the offense by neglecting to proceed against the offender, then to put on pressure to enforce its requirements. But the case is otherwise if the offense is committed in parts which are considered extra-territorial, such as the high seas. In these, all nations equally have an interest, and will proceed against individuals who are guilty of offenses against the law of nations.

PIRACY.

The term includes both the common-law offense, and also certain offenses which have been provided against by particular statutes.

Piracy at common law.(a)—The offense consists in committing those acts of robbery and depredation upon the high seas, which, if committed upon land, would have

(a) v. Phillimore, vol. 1, c. 20.

amounted to felony there.(*b*) Each state is entitled to visit the crime with the penalties which its own laws may determine.(*c*) In England, formerly the proper courts for the trial of piracy were the admiralty courts; but, later, the trial was by commissioners, nominated by the lord chancellor, in whose number were always found some common-law judges.(*d*) Now, the judges sitting at the central criminal court and at the assizes are empowered to try cases of piracy.(*e*)

The robbery must be proved as in ordinary cases of that crime committed on land. The taking must be without authority from any prince or state, for a nation can not be deemed guilty of piracy. If the subjects of the same state commit robbery upon each other it is piracy. If the injurer and the injured be of different states the nature of the act will depend on the relation of those states. If in amity it is piracy; if at enmity it is not, for it is a general rule that enemies can never commit piracy on each other, their depredations being deemed mere acts of hostility.(*f*)

The gist of the offense is the place where it is committed, viz, the high seas, and within the jurisdiction of the admiralty.(*g*)

(*b*) 1 Russ. 144. v. Trial of Joseph Dawson and others, 13 Howell's State Trials (1696), 456.

(*c*) v. Manning's Law of Nations, by Amos, 121. The crime has been thus defined by text writers on international law: "The offense of depredating on the seas without being authorized by any sovereign state, or with commissions from different sovereigns at war with each other."—(Lawrence's Wheaton's Elements of International law, 1863, p. 246.) The definition is framed to exclude depredations by lawfully authorized privateers, etc.

(*d*) 28 Hen. 8, c. 15.

(*e*) 4 and 5 Wm. 4, c. 36, § 22; 7 and 8 Vict., c. 2, § 1.

(*f*) v. In re Tivnan, 5 B. & S. 645; 2 Sir L. Jenk. 790; 1 Sir L. Jenk. 94.

It should be remembered that the declaration of Paris (1856) contained a provision that privateering should be abolished, binding on the countries parties to that declaration—Russia, Turkey, England, France, Italy, Austria, and Prussia.

(*g*) As to the jurisdiction of the Admiralty, v. Archbold's Crim. Cases, 452.

[*Piracy by Statute.*—Every person who, on the high seas, commits the crime of piracy as defined by the law of nations; every seaman who lays violent hands upon his commander thereby to hinder and prevent his fighting in defense of his vessel or the goods intrusted to him; every person who, upon the high seas, or in any open roadstead, or in any haven, basin, or bay, or in any river where the sea ebbs and flows, commits the crime of robbery upon any vessel upon any ship's company or lading; every person engaged in any piratical cruise or enterprise, or being of the crew of any piratical vessel, who lands from such vessel, and on shore commits robbery; every person who commits on the high seas, or in any river, harbor, basin, or bay, out of the jurisdiction of any particular state, murder or robbery, or any other offense which, if committed within the body of a county, would be punished with death by the laws of the United States; every citizen who commits any murder or robbery, or any act of hostility against the United States, or against any citizen thereof on the high seas, under color of any commission from any foreign prince or state, or on pretense of authority from any person; every subject or citizen of any foreign state, who is found and taken on the sea making war upon the United States, or cruising against the vessels and property thereof, or of the citizens of the same, contrary to provisions of any treaty, when by such treaty such acts are declared piracy,—is guilty of piracy, and shall suffer death.(1) Piracy is prosecuted in the circuit courts of the United States, or in a district court when no circuit court is held in the district of such court.]

The punishment for piracy was formerly death. Now the offender is liable to penal servitude to the extent of life, or to imprisonment not exceeding three years. But piracy accompanied with an assault with intent to murder, or with wounding or endangering the life of any person on board of, or belonging to, the vessel, is still punishable with death.(*m*)

(1) U. S. Rev. Stat., §§ 5368–5374, and § 563.

(*m*) 7 Wm. 4, and 1 Vict., c. 88, §§ 2. 3.

CHAPTER II.

OFFENSES AGAINST THE GOVERNMENT AND SOVEREIGN.

We now have to deal with offenses committed by members of the community in violation of their duties as subjects; these offenses for the most part also incidentally causing injury to individuals. The full treatment which the gravity of this class of crimes would demand is happily in many cases rendered unnecessary by the rarity of their occurrence. This is especially true of the crime of treason.

TREASON.(*t*)

The ordinary popular conception of treason, or, what is the same thing, the offense of a traitor, is something of this sort, "armed resistance, justified on principle, to the established law of the land." (*u*) This is the most favorable view of the offense, the notion of "principle" obscuring its gravity. But the true conception of the crime includes acts which will be admitted on all hands to be highly morally heinous, far removed from justifiable and conscientious efforts for revolution.

The crime comprises the three following classes of acts:(*x*)

"1. Execution or contrivance of acts of violence against the person of the sovereign.

(*t*) Treason against the government was termed "*high*" treason to distinguish it from "*petit*" treason, which consisted in the murder of a superior by an inferior in natural, civil, or spiritual relation; "and therefore for a wife to kill her lord or husband, a servant his lord or master, and an ecclesiastic his lord or ordinary; these, being breaches of the lower allegiance of private and domestic faith, are denominated "*petit* treason."—(4 Bl. 75.) But every offense which would previously have amounted to petit treason, is now regarded simply as murder (9 Geo. 4, c. 31, § 2), therefore there is no longer any reason for distinguishing the graver offense by the epithet "high."

(*u*) Fitz. St. 36. (*x*) Fitz. St. 113.

"2. Acts of treachery against the state in favor of a foreign enemy.

"3. Acts of violence against the internal government of the country."

In addition to these branches, the law includes a few acts which are of the rarest occurrence, and at the present day hardly demand any notice.

In order to ascertain what constitutes treason, it will be necessary to glance at the early history of the crime. For a long period there was great vagueness and uncertainty as to what acts were treasonable, the consequence being that any deed which appeared to infringe the royal rights or to interfere with the royal authority was construed into treason, though it lacked the essentials of that crime. Thus we are told(*y*) that unlawfully taking the royal venison, fish, or goods, had the effect of making the taker a traitor. To remedy this evil, and to provide certainty in a matter of so great moment, an act was passed in the reign of Edward III.(*z*) It will be well to give the actual words of the statute, and then to consider individually the offenses with which it deals.

Treason is committed "when a man doth compass or imagine the death of our lord the king, or of our lady his queen, or of their eldest son and heir; or if a man do violate the king's companion, or the king's eldest daughter unmarried, or the wife of the king's eldest son and heir; or if a man do levy war against our lord the king in his realm, or be adherent to the king's enemies in his realm, giving them aid or comfort in our realm or elsewhere, and thereof be probably (or provably, '*provablement*') attainted of open deed by people of their condition."

(*y*) Mirror, c. 1, § 4.

(*z*) 25 Edw. 3, st. 5, c. 2. "This statute is memorable, not only on account of its vast direct importance at many periods of our history, but also because it is almost the only instance which the statute book affords of a statutory definition of a crime, laid down in such a manner as to supersede the whole common law or unwritten doctrine on the subject."—Fitz. St. 36.

So much for the political or quasi-political offenses provided against; the statute proceeds to define certain other acts of treason: "And if a man counterfeit the king's great or privy seal, or his money; and if a man bring false money into this realm, counterfeit to the money of England, as the money called Lushburg, or other like to the said money of England, knowing the money to be false, to merchandise or make payment, in deceit of our said lord the king and his people; and if a man slea the chancellor, treasurer, or the king's justices of the one bench, or the other justices in eyre, or justices of assize, and all other justices assigned to hear and determine being in their places, doing their offices." It is also provided that the judges shall not give judgment in any case which is supposed to be treason till it has been determined by the king and parliament whether it ought to be treason or felony.

As he glances through the acts here enumerated, the reader will not fail to notice that treason was regarded as an offense rather against the person of the king than against the state. But in later times, with an altered state of circumstances, when the person of the king comparatively had been lost sight of in the consideration of the interests of the public, though the letter of the old law was preserved, by liberal construction it had been adapted to the new state of affairs. For example, levying war against the king was construed to include almost any act which was calculated to tend toward the subverting of the constitution.

(a.) *Compassing or imagining the death of the king, queen, or eldest son and heir.*—Here the "king" is to be understood to mean the king *de facto*, though he be not the king *de jure*. On the other hand, the person rightfully entitled to the crown, if not in possession, is not within the statute. The "queen" referred to is the queen consort, the queen regnant being included in the term "king." But against the husband of the queen regnant, treason can not be committed.

It is the designing that constitutes the offense. But this design must be evidenced by some overt act, so that if

there be wanting either the design, as in the case of killing the king by accident, or the overt act, as when the design has been formed, but laid aside before being put into execution, there is no treason.

What will constitute an overt act? Any thing willfully done or attempted by which the sovereign's life may be endangered; for example, conspirators meeting to consult on the means of killing the sovereign,(*a*) or of usurping the powers of government; (*b*) writings, if published, importing a compassing of the sovereign's death, and even words advising what would be an overt act, will suffice as evidence of the design; but not so loose words which have no reference to any designed act.(*c*)

(b.) *Violating the king's wife, the king's eldest daughter unmarried, or the wife of the king's eldest son and heir.*—By "violating" of course carnal knowledge is to be understood. The act is not divested of its treasonable character by the fact that the woman consents. In such a case both parties are guilty of treason. It has been said that the reason for making the violation of these particular persons treason, was to guard the blood royal from any suspicion of bastardy, whereby the succession to the crown might be rendered dubious.(*d*) But obviously this explanation is not supported by all the instances chosen.

(c.) *Levying war against the sovereign.*—To constitute a levying there must be an insurrection; there must be force accompanying that insurrection, and it must be for an object of a general nature.(*e*) But there need not be actual fighting: nor is the number of persons taking part in the movement material.

The levying is either *direct* or *constructive*. It is direct "when the war is levied directly against the queen or her forces, with intent to do some injury to her person, to imprison her, or the like;"(*f*) for example, a rebellion to depose her, delivering up the sovereign's castle to the enemy.

(*a*) R. *v.* Vane, Kel. 15.
(*b*) R. *v.* Hardy, 1 East, P. C. 60.
(*c*) v. R. *v.* Gordon, Dong. 593.
(*d*) 3 Inst. 9.
(*e*) R. *v.* Frost, 9 C. & P. 129.
(*f*) 1 Hale, P. C. 131, 132.

Constructive treason is of a very different character, the end of the movement being rather the purification of the government than its overthrow. It is committed for the purpose of effecting innovations of a public and general nature by an armed force. Thus, it is treason to attempt by force to alter the religion of the state, or to obtain the repeal of its laws. So it is treason to throw down *all* inclosures, open *all* prisons; but not if the attempt be to break down a particular inclosure, or deliver a particular person from prison, because in these latter cases the design is particular and not general.(*g*)

(d.) *Adhering to the sovereign's enemies.*—As in the three former cases, this offense must be evidenced by some overt act; for example, to raise troops for the enemy, or to send them money, arms, or intelligence. By the "sovereign's enemies" are meant the subjects of foreign powers with which he is at war. It appears, therefore, that a British subject, though in open rebellion, can never be deemed an enemy of the sovereign, so as to make assistance rendered to him treason within this branch of the statute.(*h*)

(e.) *Slaying the chancellor, etc.*—It will be observed that the statute applies only to the actual killing, not a mere attempt: to those judges only when actually acting in that capacity, and not at other times, and not to barons of the exchequer.

Counterfeiting the great or privy seal is no longer treason, but simple felony.(*i*) It will be treated of under the title "Forgery." So, also, coining offenses are not now treason.(*k*)

Thus was the common law of treason declared by the statute of Edward III. This statute, with certain qualifications, is still in force; in certain cases new statutes specially declaring that their provisions shall not affect any thing contained in the statute.(*l*).

(*g*) R. *v.* Dammaree, 8 St. Tr. 218.
(*h*) 1 Hale, P. C. 159; 3 Inst. 11.
(*i*) 24 and 25 Vict., c. 98, § 1.
(*k*) 24 and 25 Vict., c. 99, *passim*. v. p. 58.
(*l*) v. 11 and 12 Vict., c. 12, § 6.

Subsequently, from time to time, parliament made other offenses treason—notably several in the reign of Henry VIII., in the matter of religion. It also took upon itself the authority to declare certain acts, after they had been committed, to be treason (thus trespassing into the province of the judge);(*m*) as, for example, stealing cattle by Welshmen. All these new treasons, however, were abrogated in the reign of Edward VI. and Mary. Then, again, the statute of Edward III. was restored to its place as the standard of treason; but additions to the number of treasonable offenses have since been made by the legislature. The following still remain:

i. Endeavoring (to be evidenced by some overt act) to prevent the person entitled under the act of settlement from succeeding to the crown.(*n*)

ii. Maliciously, advisedly, and directly, by writing or printing, maintaining that any other person has any right or title to the crown, otherwise than according to the act of settlement, or that the sovereign, with the authority of parliament, may not make laws and statutes to bind the crown and descent thereof.(*o*)

iii. Compassing, imagining, inventing, devising, or intending death or destruction, or any harm tending to death or destruction, maim or wounding, imprisonment, or restraint of the person of the sovereign.(*p*)

[Every person owing allegiance to the United States, who levies war against them, or adheres to their enemies, giving them aid or comfort, within the United States or elsewhere, is guilty of treason against the United States. Rev. Stat. § 5331. Inciting or engaging in rebellion or insurrection against the United States; holding criminal correspondence with a foreign government; and conspiring to overthrow

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(*m*) Fitz. St. 36.

(*n*) 1 Anne, st. 2, c. 17, § 3.

(*o*) 6 Anne, c. 7.

(*p*) 36 Geo. 3, c. 7, § 1, confirmed by 57 Geo. 3, c. 6, § 1. The former statute also denominated certain other acts treason; but all these offenses, with the exception of those against the person of the sovereign noticed above, were converted into felonies by 11 and 12 Vict c. 12, § 1.

the government of the United States, levy war against them, or oppose by force the authority thereof, or take possession of the property thereof; are punishable by fine and imprisonment. Ib. §§ 5334–5336.

Levying war against the state or the United States, or knowingly adhering to the enemies of either, giving them aid and comfort, is treason in Ohio. 74 Ohio L. 243. Levying war against the government and people of the state is the same; or being adherent to the enemies of the state, giving them aid, advice, and comfort, in the state or elsewhere, is treason in Illinois. Rev. Stat., 1877, 387. The provision in Indiana is: "Levying war against the state, or giving aid and comfort to its enemies." Rev. Stat., 1876, 423. The same in Iowa, Rev. Code of 1873, 599; and in Kentucky, Constitution, art. 8, § 2. In Michigan, the statutes do not define treason, only fix the punishment for it. 2 Compiled Laws of Michigan, 1871, 2069.]

There are some points in connection with the procedure in prosecutions for treason which may be noticed here more conveniently than in the second part.

In the first place, no prosecution for treason can take place after three years from the commission of the offense, if it be committed within the realm, unless the treason consist of a designed assassination of the sovereign.(*q*)

The prisoner indicted for treason (or misprision of treason) is entitled to have delivered to him, ten days before the trial, a copy of the indictment, and a list of the witnesses to be called, and of the petty jurors, to enable him the better to make his defense.(*r*) But the provision does not apply to cases of treason in compassing and imagining the death of the sovereign (or misprision of such treason) where the overt act is an act against the life or person of the sovereign. In such cases, the prisoner is indicted, arraigned, and tried in the same manner and upon like evidence as if he stood charged with murder, though, if he is found guilty, the consequences are those of treason.(*s*)

(*q*) 7 and 8 Wm. 3, c. 3.

(*r*) 7 Anne, c. 21, § 11; 4 Geo. 3, c. 50, § 62.

(*s*) 39 and 40 Geo. 3, c. 93; 5 and 6 Vict., c. 51, § 1.

One overt act is sufficient to prove the treason, but any number may be mentioned in the indictment. To this overt act, or else to it and another of the same treason, there must be two witnesses, unless the accused confesses willingly.(*t*)

The prisoner may make his defense by counsel, not more than two, to be named by him, and assigned by the court or judge. He has the exceptional privilege of addressing the jury, notwithstanding that his counsel have delivered their speeches.(*u*)

Formerly the punishment for treason was of a most barbarous character. Males were drawn on a hurdle to the place of execution, and hanged, and cut down while alive; afterward they were disemboweled, the head was severed from the body, the body quartered, and the quarters placed at the disposal of the sovereign. By a wholesome statute, this proceeding was deprived of its more outrageous features, it being provided that beheading might be substituted by the sovereign, or the capital sentence might be altogether remitted.(*x*) By the same act the punishment of females, formerly burning alive, was changed to hanging. Now, by the felony act, 1870(*y*), the only part of the sentence which is retained, in any case, is the hanging.

Certain additional consequences of conviction and attainder(*z*), viz., forfeiture of lands and goods, and corruption of blood, were abolished by the statute just mentioned(*a*), but certain incapacities were at the same time attached to convictions for treason or felony.(*b*)

[The punishment of treason, under the laws of the United States, is death, or imprisonment at hard labor not less than five years, and fine not less than ten thousand dollars. In Ohio, imprisonment in the penitentiary for life; in Illinois, the punishment is death; in Indiana, death, or imprison-

(*t*) 7 and 8 Wm. 3, c. 3, §§ 2, 4; except in cases tried, as above, as for murder.

(*u*) R. *v.* Collins, 5 C. & P. 305. (*x*) 54 Geo. 3, c. 146.

(*y*) 33 and 34 Vict., c. 23, § 31.

(*z*) N.B.—A man is convicted when found guilty; he was said to be attainted when judgment had been given.

(*a*) 33 and 34 Vict., c. 23, § 1. (*b*) v. p. 404

ment for life, at the discretion of the jury; in Iowa, imprisonment at hard labor for life; in Michigan, death.]

MISPRISION OF TREASON.

Misprision of treason consists in the bare knowledge and concealment of treason, any degree of assent making the party a principal. At common law this mere concealment, being construed as aiding and abetting, was regarded as treason, inasmuch as, it will be remembered, there is no distinction into principals and accessories in treason.(c) It was specially enacted that a bare concealment of treason should be held a misprision only.(d) The only punishment now is imprisonment. The party knowing of any treason must, as soon as possible, reveal it to some judge of assize, or justice of the peace.

[Misprision of treason, under the laws of the United States, is punished by fine and imprisonment. Rev. Stat., § 5333. In Ohio, by imprisonment in the penitentiary, 74 Ohio L. 243; and the same in Illinois, Rev. Stat., 1877, 387; and Indiana, Rev. Stat., 1876, 423; in Iowa, fine and imprisonment, Rev. Code, 1873, 599; same in Michigan, Com. Statutes, 1871, 2069.]

SEDITION.

Sedition is a comprehensive term, embracing all those practices, whether by word, deed, or writing, which are calculated to disturb the tranquillity of the state, and lead ignorant persons to endeavor to subvert the government and the laws of the empire. The objects generally are to incite discontent or dissatisfaction, to stir up opposition to the government, and to bring the administration of justice into contempt.(j)

This description is somewhat vague; but in that respect it only resembles the offense itself. It is hard to lay down any decisive line, on one side of which acts are seditious, and on the other innocent. The term "sedition" is commonly used in connection with words written or spoken.

(c) v. p. 40. (d) 1 and 2 Phil. & Mary, c. 10.
(j) R. v. Sullivan, R. v. Pigott 11 Cox, 44 45

It includes, however, many other acts, some of which are treated of separately; for example, training to arms, unlawful secret societies or meetings, etc.

What is sufficient to constitute seditious libels or words? It may be answered generally—such political writings or words as do not amount to treason,(*k*) but which are not innocent. We have already seen what constitute treason As to what are innocent: It is the right of a free subject to criticize and censure freely the conduct of the servants of the crown, whether ministerial or judicial, and the acts of the government and proceedings in courts of justice, so long as he does it not with malignity nor imputes corrupt or malicious motives.(*l*) The test proposed by an eminent authority is the following: "Has the communication a plain tendency to produce public mischief by perverting the mind of the subject and creating a general dissatisfaction toward government?"(*m*)

Proving the truth of a seditious libel is no excuse for the publishing it; nor will it extenuate the punishment, inasmuch as the statute,(*n*) which allows the defendant charged with libel to plead the truth under certain conditions, does not apply to seditious libels.(*o*)

The punishment for seditious libels or words is fine and imprisonment. Punishable in the same way are slanderous words uttered to a magistrate

OFFENSES AGAINST THE FOREIGN ENLISTMENT ACT.

[Under the neutrality laws of the United States, it is a crime, punishable with fine and imprisonment, for any citizen to accept, within the United States, a foreign commission to serve against people at peace with the United States; for any person within the United States to enlist or hire another to go without the limits of the United States to enlist in the military or naval service of any

(*k*) Though treason itself may be said to be a kind of sedition.
(*l*) R. *v.* Sullivan, etc., *supra.* (*m*) v. 1 Russ. 339.
(*n*) 6 and 7 Vict., c. 96, § 6.
(*o*) R. *v.* Duffy, 2 Cox, 45; R. *v.* Burdett, 4 B. & Ald. 95.

foreign prince or state; for any person within the United States to be concerned in fitting out any vessel to be employed by any foreign state against any people at peace with the United States; for any citizen, without the limits of the United States, to be concerned in fitting out any privateer to commit hostilities upon citizens of the United States or their property.(1)]

MUTINY AND INCITING THERETO.

[If any one of the crew of an American vessel on the high seas, or elsewhere within the admiralty and maritime jurisdiction of the United States, unlawfully, with force, fraud, or intimidation usurps the command of the vessel, or deprives the officer in command of authority and command on board, or resists and prevents his free lawful exercise thereof, or transfers such authority and command to one not lawfully entitled thereto, he is guilty of revolt and mutiny, to be punished by fine and by imprisonment at hard labor not more than ten years.(2)

If any one of the crew of any American vessel, anywhere within the admiralty and maritime jurisdiction of the United States, endeavors to make a mutiny on board such vessel, or conspires with any other person on board to make such mutiny, or stirs up any of the crew to disobey or resist the lawful orders of the master or other officer of such vessel, or to neglect their proper duty on board, or to betray their proper trust, or assembles with others in a tumultuous and mutinous manner, or makes a riot on board, or unlawfully confines the commanding officer, he shall be punished by fine or imprisonment not more than five years or both.(3)]

APPENDIX.

OFFENSES BY MEMBERS OF THE ARMY AND NAVY.

It will be convenient here to see on what footing the

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(1) U. S. Rev. Stat., §§ 5281–5284. (2) U. S. Rev. Stat., § 5360.
(3) U. S. Rev. Stat., § 5359.

army and navy are with regard to proceedings and punishment for crime.

As to the *army:* It is provided by the Army Discipline Act, 1879, that every officer or private who shall incite or join any mutiny, or knowing of it shall not give notice to the commanding officer, or shall desert, or enlist in any other regiment, or sleep upon his post, or leave it before he is relieved, or hold correspondence with a rebel or enemy, or strike or use insolence to his superior officer, or disobey his lawful commands, shall suffer death or such other punishment as the court martial may inflict. Other offenses are set forth and their punishments prescribed. The court martial may sentence any officer or soldier to death, penal servitude, imprisonment, forfeiture of pay or pension, or any other punishment which shall accord with the usage of the service. No person acquitted or convicted by a civil magistrate or by a jury is to be tried by court martial for the same offense.

The Act does not, however, exempt soldiers from being punishable by the ordinary criminal courts. It expressly provides that nothing therein is to be construed to extend to exempt any officer or soldier from being proceeded against by the ordinary courts of law, when accused of felony or misdemeanor, or of any offense other than absenting himself from service or misconduct respecting his contract.(*s*) And if a person who has been sentenced for an offense by a court martial is afterward tried by a civil court for the same offense, that court in awarding punishment shall have regard to the military punishment he may have already undergone.

(*s*) 42 and 43 Vict., c. 33, §§ 138, 155.

The mutiny act does not, however, exempt soldiers from being punishable by the ordinary criminal courts. It expressly provides that nothing therein is to be construed to extend to exempt any officer or soldier from being proceeded against by the ordinary courts of law, when accused of felony or misdemeanor, or of any crime or offense other than the misdemeanors and offenses mentioned in the act.

As to the *navy:* The naval discipline act (1866)(*o*) makes similar provisions for the navy as to courts-martial, the trial of offenses, no exemption from ordinary criminal jurisdiction, etc.

COINAGE OFFENSES.

So decidedly were offenses relating to the coin regarded as offenses against the government, inasmuch as they not only infringed the royal prerogative, but also were calculated to makes the public faith suspected, that in the statute of Edward III. two of them were declared treason, viz., (a) the actual counterfeiting the gold and silver coin of the realm, and (b) the importation of such counterfeit money with intent to utter it, knowing it to be false.(*p*) These offenses were, however, made felonies by a later statute.(*q*)

It may be noticed that at least one class of coinage offenses, viz., uttering counterfeit money, might be dealt with as a particular case of obtaining goods or money by false pretenses.(*r*)

The law on the subject under consideration has been consolidated by a recent statute.(*s*) It will be our task to present its matter under several heads.

A. *Counterfeiting coin.*—A distinction is made as to the kind of coin. Whosoever falsely makes or counterfeits any coin resembling, or apparently intended to resemble or pass for—

(*o*) 29 and 30 Vict., c. 109.
(*p*) v. p. 48.
(*q*) 2 Wm. 4, c. 34.
(*r*) Fitz. St. 141.
(*s*) 24 and 25 Vict., c. 99. In the present division the quoting of a section must be understood to refer to this act.

i. The current gold or silver coin of this realm, commonly called the queen's money,(*t*)

ii. Foreign gold or silver coin,(*u*)

iii. The queen's current copper coin, (*x*)

is guilty of felony, and is punishable, in the case of gold and silver coin of the realm, with penal servitude to the extent of life; in the other cases, to the extent of seven years.

Counterfeiting—

iv. Foreign coin other than gold or silver coin is a misdemeanor, punishable, for the first offense, with imprisonment not exceeding one year; for the second offense, with penal servitude to the extent of seven years.(*y*)

The offense is complete although the false coin has not been finished, or is not in a fit state to be uttered;(*z*) much less is any attempt to utter necessary. Any one, not necessarily an officer from the mint, may, at the trial, prove the falseness.(*a*) In this offense is included that committed by persons lawfully engaged in coining, who make the coin lighter or of baser alloy. The counterfeiting can generally only be proved by circumstantial evidence; for example, by proof of finding coining tools in working order, and pieces of the money, some in a finished, some in an unfinished state.

B. *Coloring coin.*—Coloring, washing, etc., counterfeit coin, or any piece of metal with intent to make it pass for gold or silver coin; or coloring, filing, or otherwise altering genuine coin with intent to make it pass for coin of a higher degree, is a felony, punishable with penal servitude to the extent of life.(*b*)

C. *Impairing, etc., gold and silver coin.*—Impairing, diminishing, or lightening any of the queen's gold or silver coin, with the intent that it shall pass for gold or silver coin, is felony, punishable with penal servitude to the extent of fourteen years.(*c*)

Having in possession any filings, clippings, dust, etc.,

(*t*) § 2. (*u*) § 18. (*x*) § 14.
(*y*) § 22. (*z*) § 30. (*a*) § 29
(*b*) § 3. (*c*) § 4.

obtained by the above-mentioned process, is a felony, the limit of penal servitude for which is seven years.(*d*)

D. *Defacing coin.*—Defacing the queen's gold, silver, or copper coin, by stamping thereon any names or words, although the coin be not thereby lightened, is a misdemeanor, punishable with imprisonment not exceeding one year.(*e*) It should be added that coin so defaced is not legal tender; and by the permission of the attorney-general or lord advocate, any person who tenders or puts off coin so defaced may be brought before two magistrates, and on conviction be fined not exceeding forty shillings.(*f*)

E. *Buying or selling, etc., counterfeit coin at lower value.*—Any person, without lawful authority or excuse (the proof whereof lies on the accused), buying, selling, receiving, or putting off any counterfeit coin for a lower rate or value than it imports, is guilty of felony. If the counterfeit be of gold or silver, the extent of penal servitude is life(*g*); if copper, the limit is seven years.(*h*)

F. *Importing and exporting counterfeit coin.*—Importing or receiving into the United Kingdom from beyond the seas, without lawful authority, etc., counterfeit gold or silver coin, knowing the same to be false and counterfeit, is a felony, punishable with penal servitude to the extent of life.(*i*) It is said that importing the coin from the queen's dominions beyond the seas does not fall within this section, because the counterfeiting there is punishable by the laws of England.(*j*) Importing foreign counterfeit coin is a felony, the limit of the penal servitude for which is seven years.(*k*)

Exporting, or putting on board any vessel for the purpose of being exported from the United Kingdom any coin counterfeit of the queen's current coin, without lawful authority, etc., is a misdemeanor punishable with imprisonment not exceeding two years.(*l*)

G. *Uttering counterfeit coin.*—Tendering, uttering, or putting off counterfeit gold or silver coin, knowing the

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(*d*) § 5. (*e*) § 16. (*f*) § 17.
(*g*) § 6. (*h*) § 14. (*i*) § 7.
(*j*) v. Arch. 788. (*k*) § 19. (*l*) § 8.

same to be false and counterfeit, is a misdemeanor punishable with imprisonment not exceeding one year.(*m*) If at the time of uttering, the offender has any other counterfeit coin in his possession, or if he within ten days utters another coin, knowing it to be counterfeit, the punishment may extend to two years.(*n*) If the uttering is after a previous conviction for either of these offenses, or for having in possession three or more pieces of counterfeit, or for any felony relating to the coin, the utterer is guilty of felony, and may be sentenced to penal servitude for life.(*o*)

Uttering counterfeit coin meant to resemble a foreign gold or silver coin, is punishable for the first offense with imprisonment not exceeding six months; for the second not exceeding two years. The third offense is a felony punishable with penal servitude to the extent of life.(*p*)

Uttering spurious coin, *e. g.*, foreign coin, medals, pieces of metal, etc., as current gold or silver coin, with intent to defraud, is a misdemeanor punishable with imprisonment to the extent of one year.(*q*)

H. *Having counterfeit coin in possession.*—Having three or more counterfeit gold or silver coins in possession, knowing them to be counterfeit, and intending to utter or put off them, or any of them, is a misdemeanor punishable with penal servitude limited to five years (*r*) If after previous conviction for either of the misdemeanors mentioned in sections 9 and 10, or any felony relating to the coin, the crime is a felony, and may be punished with penal servitude to the extent of life.(*s*) If the coin is the queen's copper coin, the limit of the punishment is imprisonment for one year.(*t*) Having in possession without lawful excuse more than five pieces of foreign counterfeit coin renders the possessor liable to a penalty on conviction before a justice.(*u*)

I. *Making, etc., coining tools.*—Knowingly and without lawful authority, etc., making or mending, buying or selling, or having in custody or possession any coining instru-

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(*m*) § 9. (*n*) § 10. (*o*) § 12.
(*p*) §§ 20, 21. (*q*) § 13. (*r*) § 11.
(*s*) § 12. (*t*) § 15. (*u*) § 23.

ment or apparatus adapted and intended to make any gold or silver coin or foreign coin, is a felony punishable with penal servitude for life.(x) If the instruments, etc., are designed for coining the queen's copper coin, the limit of the penal servitude is seven years.(y)

[Congress is charged by the constitution of the United States with the regulation of the coinage of money. The national government therefore provides for the protection of the coinage.(1) It is therefore made felony by the laws of the United States to counterfeit coin made by the United States, or any gold or silver foreign coin made current by statute, or in use and circulation as money; or to deface or impair any such coin; or to make or utter without authority of law any coin to be used as current money.(2)

Wherever coin is current as money, the government has the right to protect the people in its use.(3) It is therefore made felony under the laws of the several states to counterfeit any gold or silver coin current in the state, or to utter the same, or to have the same in possession with intent to utter.(4)

Whether the coin alleged to be counterfeited is current in the state or not, is a question for the jury.(5) A coin called a California five dollar piece, made in a state contrary to the constitution of the United States, can not be called a coin current by usage, for usage can not be set up in violation of law.(6) "Knowingly having possession" means knowingly having possession with criminal intent.(7) Secreting within the county and having within

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(x) § 24. (y) § 14.

(1) United States v. Marigold, 9 How. 560.

(2) U. S. Rev. Stat., §§ 5457-5462

(3) Sutton v. State, 9 Ohio, 133; Sizemore v. State, 3 Head, 26; State v. McPherson, 9 Iowa, 53.

(4) Rev Stat., Ind. 1876, pp. 440, 441; Rev. Stat., Ill. 1877, p. 365; Rev. Stat., Mich. 1871, p. 2102; Rev. Stat., Iowa, 1873, p. 611. In Ohio, the statute embraces also copper coin, 74 Ohio L. 294; and, in Kentucky, "other coin," Rev. Stat., 1877, p. 330.

(5) Fight v. State, 7 Ohio (pt. 1), 130.

(6) Commonwealth v. Bond, 1 Gray, 564.

(7) People v. White, 34 Cal. 183.

control is a possession.(1) Under the statute against having in possession ten similar pieces of gold or silver coin, it is sufficient if the offender have in possession ten pieces of either kind of coin, though not all of the same denomination."(2)]

(1) State v. Washburne, 11 Iowa, 245.
(2) Brown v. Commonwealth, 8 Mass. 59.

CHAPTER III.

OFFENSES AGAINST RELIGION.

On what grounds does the state arrogate to itself the right of punishing offenses against religion? Certainly not as the minister of God. The state has observed that certain acts or courses of conduct, which are forbidden by religion, are also productive of disorder and mischief to the community. It has therefore provided for the punishment of those that offend, not in consequence of the breach of the law of God, but as the result of the breach of the law of the country. That the state does not consider itself under an obligation to enforce the law of morality, as such, is obvious from the fact that mere lying and other acts of immorality are not within the pale of the criminal law. This violation of human law is the true ground of interference, though in some of the offenses we shall notice it is impossible to shut our eyes to the fact that in early times the legislators did to some extent consider themselves authorized to punish mere irreligion.

APOSTACY—BLASPHEMY.

Apostacy, or the total *renunciation* of Christianity, was for a long period punished by the ecclesiastical courts only, at one time the punishment they awarded being death. Later, however, the civil power thought it necessary to interfere, "by not admitting those miscreants to the privilege of society who maintained such principles as destroyed all moral obligations."(*f*) It was provided that if any one *educated in, or having made profession of* the Christian religion, by writing, printing, teaching, or advised speaking, maintains that there are more Gods than one, or denies the Christian religion to be true, or the Holy Scripture to be

(*f*) 4 Bl. 44.

of divine authority, for the second offense, besides being incapable of bringing an action, or being guardian, executor, legatee, or grantee, must suffer imprisonment for three years without bail.(*g*) There shall be no prosecution for such words spoken, unless information of such words be given on oath before a justice within four days after they are spoken, and the prosecution be within three months after such information.(*h*) The offender is to be discharged, if, within four months after his first conviction, he renounces his error.(*i*)

Blasphemy is also punishable at common law by fine and imprisonment. Christianity, as it is said, is a part of the law of England, and a gross outrage against it is to be punished by the state. The offenses include not only the blasphemous libels by one who has been attached to the Christian religion and has apostatized, as to which we have seen particular provisions have been made, but also denying, whether orally or by writing, the being or providence of the Almighty, contumelious reproaches of our Lord and Savior Christ, profane scoffing at the Holy Scriptures, or exposing any part thereof to contempt or ridicule.(*k*) The libel, to be blasphemous, must consist not in an honest denial of the truths of the Christian religion, but in a willful intention to pervert, insult, and mislead others by means of licentious and contumelious abuse applied to sacred subjects.(*l*) But the disputes of learned men upon particular points of religion are not punished as blasphemy.(*m*) It remains merely to add that the law is rarely put in force, and then only because the libel is of a most extravagant nature.

DISTURBING PUBLIC WORSHIP.

Any person willfully and maliciously or contemptuously disturbing any lawful meeting of persons assembled for public worship, or molesting the person officiating or any of those assembled, upon proof by two or more credible witnesses before a magistrate, must answer for such offense at the sessions, and upon conviction is fined forty pounds.(*n*)

(*g*) 9 and 10 Wm. 3, c. 32, § 1; in the Rev. Stat., c. 35.
(*h*) Ibid., § 2.
(*i*) Ibid., § 3
(*k*) v. 1 Russ. 332, 333.
(*l*) Reg. *v.* Ramsay, 48 L. T. N. S. 73.
(*m*) For cases v. Arch. 814.
(*n*) 52 Geo. 3, c. 155, § 12.

Riotous, violent, or indecent behavior is also punishable on summary conviction.(*n*)

WITCHCRAFT, SORCERY, ETC.

Punishment (generally death) for these supposed evil practices belonged to a state of society different from ours. It is only about a century and a half, however, since an act was passed to the effect that prosecutions for such practices should cease; at the same time making punishable by imprisonment persons pretending to use witchcraft, tell fortunes, or discover stolen goods by skill in any occult or crafty science.(*o*) By a later statute, persons using any subtle craft, means, or device, by palmistry, or otherwise to deceive her majesty's subjects, are dealt with in their true character, namely, as rogues and vagabonds, and are punishable by imprisonment.(*p*)

Under this head may be noticed the case of religious impostors, who are punishable by fine and imprisonment.

Two offenses dealt with by the magistrates may be noticed here briefly:

Profane swearing is punishable on summary conviction by fine.(*q*)

Profanation of the Sabbath is an offense which has been brought into prominence through recent prosecutions. The statute of Charles II. provides that no person may do any work of his *ordinary* calling upon the Lord's day, works of necessity and charity only excepted, under penalty of five shillings. Nor may any one expose to sale any wares, on penalty of forfeiting his goods; nor may drovers, etc., travel, under a penalty of forty shillings.(*r*) But no prosecution for such offense may be commenced without the consent of the chief officer of the district, or of two justices, or of a stipendiary magistrate.(*s*)

Places of amusement, debate, etc., open on Sunday, admission to which is paid for, are to be deemed disorderly

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(*n*) v. 23 and 24 Vict., c. 32, § 2.
(*o*) 9 Geo. 2, c. 5.
(*p*) 5 Geo. 4, c. 83, § 4.
(*q*) v. 19 Geo. 2, c. 21.
(*r*) 29 Car. 2, c. 7.
(*s*) 34 and 35 Vict., c. 87, continued by subsequent statutes.

houses, and as such may be suppressed, and the keeper fined or imprisoned.(*t*) The crown has, however, recently been empowered to remit the penalties.(*u*)

Certain practices, which were at one time criminally punishable, are now no longer so. *Heresy*, which consists not in a total denial of Christianity, but in an open denial of some of its principal doctrines, as held by the church, has been again subjected only to ecclesiastical correction, *pro salute animæ*.(*x*) Offenses against the national church, which are either *negative*, that is, non-conformity, or *positive*, by reviling its ordinances, etc.,(*y*) though nominally liable to legal penalties, are never practically made the subjects of prosecution.(*z*)

(*t*) 21 Geo. 3, c. 49; v. p. 119.

(*u*) 38 and 39 Vict., c. 80; v. Terry *v.* Brighton Aquarium Co., L. R. 10, Q. B. 306.

(*x*) 29 Car. 2, c. 9; 4 Bl. 49. (*y*) v. 1 Edw. 6, c. 1; 1 Eliz., c. 2.

(*z*) As to Simony, v. 4 St. Bl. 212.

CHAPTER IV.

OFFENSES AGAINST PUBLIC JUSTICE.

In the first place, we shall treat of that class of offenses against public justice which consist in avoiding oneself, or assisting another to avoid, the punishments awarded by a court of justice.

Escape; Breach of Prison; Being at large during a term of Penal Servitude; Rescue; Obstructing Lawful Arrest.

ESCAPE.

The distinction between the first two and fourth offenses has been thus put: Where the liberation of the party is effected either by himself or others, without force, it is more properly called an *escape;* where it is effected by the party himself, with force, it is called *prison breaking;* where it is effected by others, with force, it is commonly termed a *rescue.*(*a*) We have to consider the cases of delinquents in three positions—the prisoner who escapes; the person who aids him; those in whose custody he is, whether officers of the law or private individuals.

If a prisoner escapes out of the custody of the constable, before he is imprisoned, he is punishable with fine and imprisonment.

Officers who, after an arrest, *negligently* allow a prisoner to escape are punishable with fine; if they *voluntarily* permit it, they are deemed guilty of the same offense, and are liable to the same punishment, as the prisoner who escapes from their custody; and this whether the latter has been committed to jail, or is only under bare arrest. But the officer can not be thus punished for a felony, until after the original offender has been convicted. Before the conviction, however, he may be fined and imprisoned as for a

(*a*) v. 1 Russ. 581; 1 Hale, P. C. 590.

misdemeanor. The allowing the escape is punishable criminally only if the original imprisonment were for some criminal matter.

Private individuals, having persons lawfully in their custody, who *negligently* allow an escape, are punishable by fine or imprisonment, or both; *if voluntarily*, they are punishable as an officer would be under the same circumstances. Of course, at any time, they may deliver the person in charge over to an officer.

Aiding in the escape of a prisoner from a prison, other than a convict, military, or naval prison,(*b*) or, with intent so to aid, conveying to him a mask, disguise, instrument, or any other thing, is a felony, punishable with imprisonment to the extent of two years.(*c*) Aiding a prisoner in custody for treason or felony to make his escape from the constable or officer conveying him under a warrant to prison is a felony punishable with penal servitude to the extent of seven years.(*d*) Aiding a prisoner of war to escape is a felony punishable with penal servitude for life.(*e*)

BREACH OF PRISON.

The consequences of breach of prison vary according to the crime for which the prisoner is in custody. If he is in custody for treason or felony, the breach is also felony, and punishable by penal servitude to the extent of seven years; and, in the case of a man, also by whipping once, twice, or thrice.(*f*) If he is in custody for any other offense, the breach is a misdemeanor, and punishable by fine and imprisonment. There seems also to be this difference between the two cases—in the first, it must be proved that the prisoner escaped; in the second, this is not necessary.

To constitute this offense, there must be an actual breaking, though it need not be intentional. Merely getting over the wall and the like is an escape only. It will be a sufficient defense to prove that the prisoner has been in-

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(*b*) As to these, see the statutes quoted in Arch. 838-9.

(*c*) 28 and 29 Vict., c. 126, § 37. (*d*) 16 Geo. 2, c. 31, § 3.

(*e*) 52 Geo. 3, c. 156.

(*f*) 1 Edw. 2, st. 2, c. 1, in Rev. Stat., 23 Edw. 1. *Stat. de frang. pris*

dicted for the original offense and acquitted; otherwise, it is not material whether the accused was guilty of the original offense or not.

"Prison" here includes any place where one is lawfully imprisoned, whether upon accusation or after conviction; for example, in the jail or constable's house.

BEING AT LARGE DURING TERM OF PENAL SERVITUDE.

Penal servitude was substituted for transportation in the year 1857;(*g*) but the incidents of the latter attach to the former.

For a convict to be at large, without lawful authority, which it lies on him to prove, before the expiration of the term of transportation or penal servitude to which he was sentenced, is a felony punishable by penal servitude, even to the extent of life, and previous imprisonment not exceeding four years; or else by imprisonment not exceeding two years.(*h*)

RESCUE.

Rescue is the forcibly and knowingly freeing another from arrest or imprisonment. If the original offender is convicted, the rescuer is guilty of the same offense as such original, whether it be treason, felony, or misdemeanor. If the rescuer is thus convicted of felony, the punishment is penal servitude to the extent of seven years, or imprisonment from one to three years;(*i*) if of misdemeanor, fine or imprisonment, or both. If the original is not convicted, nevertheless the rescuer may be punished by fine and imprisonment as for a misdemeanor.(*j*)

Rescuing or attempting to rescue a person convicted of murder, whilst proceeding to execution; or rescuing out of prison a person committed for or convicted of murder, is a felony punishable with penal servitude to extent of life, or imprisonment not exceeding three years.(*k*)

(*g*) 20 and 21 Vict., c. 3.
(*h*) 5 Geo. 4, c. 84, § 22; 4 and 5 Wm. 4, c. 67.
(*i*) 1 and 2 Geo. 4, c. 88, § 1. (*j*) 2 Hawk., c. 21, § 8.
(*k*) 25 Geo. 2, c. 37, § 9; 7 Wm. 4, and 1 Vict., c. 91, § 1.

Rescuing or attempting to rescue an offender sentenced to penal servitude from a person charged with his removal, is a felony punishable in the same way as if the party had been in jail.(*l*)

Another offense, somewhat of the same character, cattle instead of persons being rescued from the custody of the law, is *poundbreach*. To rescue cattle distrained for rent or for *damage feasant* is a misdemeanor at common law, punishable by fine and imprisonment or both.

OBSTRUCTING LAWFUL ARREST, ETC.

To prevent the execution of lawful process is at all times an offense, but more especially so when the object is to prevent the arrest of a criminal. It has been held that the party opposing such an arrest becomes thereby *particeps criminis;* that is, an accessory in felony, otherwise a principal.(*m*) The statutes abolishing so-called sanctuaries or privileged places make opposition in those places a felony.

An assault upon, resistance to, or willful obstruction of a peace officer in the execution of his duty, or any person acting in his aid; or an assault upon any person with intent to resist or prevent the lawful apprehension or detainer of himself or of any other person for any offense, is a misdemeanor, punishable with imprisonment to the extent of two years.(*n*) Wounding, doing grievous bodily harm to, shooting at, or attempting to shoot at, any person with such intent, is punishable with penal servitude to the extent of life.(*o*)

Not only positively obstructing an officer, but also refusing to aid him in the execution of his duty in order to preserve the peace, is a crime. The latter offense is a misdemeanor at common law.(*p*)

PERJURY.

The crime committed by one who, when a *lawful* oath is

(*l*) 5 Geo. 4, c. 84, § 22.
(*m*) 2 Hawk., c. 17, § 1.
(*n*) 24 and 25 Vict., c. 100, § 38.
(*o*) Ibid., § 18.
(*p*) v. R. v. Brown, C. & M. 314.

administered to him in some proceeding *in a court of justice* of *competent jurisdiction*, swears *willfully*, *absolutely*, and *falsely* in a matter *material* to the issue or point in question.(*q*)

Such is the definition of perjury at common law. The qualification with which it must be taken will appear below. Certain other false oaths are attended by the punishments of perjury, though they are not known by that name. And whenever an act of parliament requires an oath to be taken, but does not make it perjury to take a false oath, though not perjury, the taking such oath is a misdemeanor;(*r*) for example, the oath required to be taken before a surrogate in order to obtain a marriage license.(*s*)

It may be necessary to remind the reader that the false affirmation of a Quaker, Moravian, Separatist, or of any other person who is by law authorized to make an affirmation or declaration in lieu of an oath, is on the same footing, and visited with the same consequences, as perjury.

The nature of the oath must first be considered: a lawful oath taken in a judicial proceeding, administered within the authority of the tribunal, etc., administering. As a rule it must be taken in *a court of justice*, but there are apparent exceptions; for example, it has been held perjury for a clergyman to take a false oath against simony at the time of his institution.(*t*) It is immaterial whether the oath be taken in the face of the court, or out of it by a person authorized to examine matters depending in it, as in the case of affidavits; or whether it be taken in relation to the merits of the cause, or in a collateral matter, for example, on inquiring into the sufficiency of bail.(*u*) The oath must be taken before a person who has *jurisdiction* of the cause, and lawful authority to administer the oath. Thus, in the case of a trial taking place where the court has no jurisdiction, a witness can not be indicted for perjury thereat. Nor if the court, etc., has authority to administer some oath, but not that which is the foundation

(*q*) 3 Inst. 164; v. R. *v.* Aylett, 1 T. R. 69.
(*r*) Fitz. St. 277.
(*s*) R. *v.* Foster, R. & R. 459.
(*t*) R *v.* Lewis, 1 Str. 70.
(*u*) 3 Russ. 3.

of the charge. Every court, judge, justice, officer, commissioner, arbitrator, or other person now or hereafter having, by law or by consent of parties, authority to hear, receive, and examine evidence, is empowered to administer an oath to all witnesses legally called.(*x*)

The oath must be taken *falsely*, *willfully*, and *absolutely*; "falsely" refers to the taking of the oath, not to the truth of what is sworn. It is immaterial whether the fact which is sworn to be in itself true or false. The question is: Did the defendant believe what he said to be true? If, not, he is guilty of perjury. It is not necessary that he should know that it was untrue; for he will be guilty if he swears to the truth, not knowing any thing about the matter; much more if he swears to the truth, thinking what he swears is untrue. In other words, he is guilty if his intention can be proved to be to deceive. Thus he will not be innocent, though he swears that he only *believes* such and such to be the case, if he knows it to be not so. Of course it will be more difficult in such cases to establish the guilt of the defendant.(*y*) As we have just seen, the answer must be given intentionally or willfully; it must also be given with some degree of deliberation. Mere inadvertence or mistake will not support the charge, as, if the witness is bewildered on cross-examination. Of course prevarication, though the actual words used are true, will not shield the defendant; as when a witness assured the court that a man could not live for two hours longer if he went on as he (the witness) left him; the fact being that at the time he was very well, but had got a bottle of gin to his mouth.(*z*)

The matter sworn to must be *material* to the cause depending in the court. If the matter is wholly foreign to the purpose, or altogether immaterial, and neither any way pertinent to the matter in question, nor tending to aggravate or extenuate the damages, nor likely to induce the jury to give a readier credit to the substantial part of the evidence, it can not be perjury.(*a*) Thus, if on a trial to determine whether a person is sane or not a witness intro-

(*x*) 14 and 15 Vict., c 99, § 16.
(*y*) R. *v.* Pedley, 1 Leach, 327.
(*z*) Loft's Gilb. Ev. 662.
(*a*) 1 Hawk., c. 69, § 8.

duces his evidence by giving an account of a journey which he took to see the party, and swears falsely in relation to some of the circumstances of the journey, this would not be sufficient to support an indictment for perjury.(*b*)

It is not necessary to constitute perjury that the false oath be believed, or that any person be damaged by it; for the prosecution is grounded, not on the damage to the party, but on the abuse of public justice. A false verdict is not regarded as perjury, because it is said the jurors do not swear to depose the truth, but only to judge of the depositions of others. So the breaking of their oaths by interpreters, officers in charge of the jury, etc., does not amount to perjury, inasmuch as it is an essential of perjury that the accused has been sworn to depose to the truth.

Upon an indictment for perjury, it is sufficient if any one of the assignments of perjury be proved.(*c*)

Perjury is one of the offenses included under the vexatious

(*b*) It is suggested that there is no solid ground for this rule as to materiality; that it originated in a misapprehension. The authorities on which it is based "appear to be cases in which the witness misunderstood the gist of the question, and so was rather mistaken than perjured. If this were so, the inference drawn from the cases ought to be, not that the circumstances must be material, but that the witness must understand that the court requires him to answer specifically upon these points. It is obviously a very different thing to give an answer circumstantially incorrect under a misapprehension of the point of the question asked, and willfully to swear falsely on some circumstance collateral to the principal point at issue. It clearly ought to be the duty of the witness to give true answers to every question asked by the court. To allow him to answer immaterial questions falsely, is to extend an arbitrary impunity to a certain number of perjuries, for it can not be supposed that any witness knows at the time of swearing whether the question which he answers is material or not."—Fitz. St. 279.

The groundlessness of this rule was adverted to by Erle, C. J., in the following terms: "Whenever the question arises whether a person may not be guilty of perjury, who, with intent to mislead the court, willfully swears falsely on a matter which, in the opinion of the judge, is of doubtful admissibility, or immaterial to the inquiry, it will be one well worthy of the careful consideration of all the judges."—R. *v.* Mullany, 34 L. J. (M. C.) 111.

(*c*) R. *v.* Rhodes, 2 Lord Raym. 886.

indictments act; and, therefore, no bill of indictment can be presented to, or found by, the grand jury unless one of the preliminary steps indicated in the act has been taken.(*d*)

Any judge(*e*) may direct the prosecution of a person who appears to have been guilty of perjury in his evidence given before him, and may commit the accused to jail, unless he gives sufficient security for his appearance at the assizes.(*f*)

It is a well-known rule that the testimony of a single witness is not sufficient to convict on a charge of perjury. Two witnesses at least must contradict what the accused has sworn; or, at any rate, one must so contradict, and other evidence must materially corroborate that contradiction.(*g*) But this rule does not apply when the perjury consists in the defendant's having contradicted what he swore on a former occasion; in this case, the testimony of a single witness in support of the defendant's own original statement will suffice.(*h*) The reason usually assigned for the rule is, that if one witness were allowed to suffice to prove perjury, it would only be oath against oath. But other considerations, such as the great necessity for the protection of witnesses, also have weight.(*i*)

Perjury is a misdemeanor. At one time it was punished with death; afterward with fine and imprisonment. Now the punishment is again more severe, namely penal servitude to the extent of seven years, or imprisonment to the same extent.(*k*)

[Perjury is felony throughout the United States. It is

(*d*) v. p. 288.

(*e*) As to who are comprised in this term, see the act.

(*f*) 14 and 15 Vict., c. 100, § 19.

(*g*) v. R. *v.* Boulter, 21 L. J. (M. C.) 57; 5 Cox, 543.

(*h*) R. *v.* Knill, 5 B. & Ald. 929, n.

(*i*) v. Best, Ev. 751. This rule seems to be a second instance (v. p. 24) of the law's interference with the province of the jury. It should always be a part of their duty to estimate the credibility of witnesses.

(*k*) 2 Geo. 2, c. 25, § 2. In cases where another's life is willfully "sworn away" by a perjurer, it is hard to see why the latter should not be regarded as guilty of murder. The punishment for the crime is by no means excessive.

perjury under the United States laws for a person willfully, etc., to swear to "any material matter which he does not believe to be true." Rev. Stat. § 5392. The statutes of Michigan do not define perjury, but only prescribe its punishment. Rev. Stat., 1872, 2105. In the statutes of Kentucky, one section prescribes the punishment for "perjury," without defining it, and another section prescribes punishment for "willfully, knowingly, etc., swearing, etc., that which is false." Rev. Stat., 1877, 328, 329. In Indiana, Illinois, and Iowa, it is perjury to willfully and corruptly swear, or affirm falsely. 2 Rev. Stat. Ind., 1876, 443; Rev. Stat. Ill., 1877, 383; Iowa Code, 1873, § 3936, p. 613. In Ohio, the statute expressly requires that the statement sworn to must be false. 74 Ohio L. 258.

A state court has no jurisdiction of an act of perjury committed in proceedings under an act of congress.(1.) In New York, it was held that perjury in a proceeding for naturalization in a state court is an offense against the general government, and is punishable by proceeding in the courts of the United States, and not in the state courts.(2) Perjury may be assigned in Ohio upon an oath and deposition, taken before a notary public in Ohio, in a suit pending in a court in Indiana.(3)

Perjury can not be committed in a case of which the court has not jurisdiction.(4) But the testimony of an incompetent witness may be material, and be the occasion of perjury.(5)

It is not the law anywhere in the United States that perjury can not be proved except by two witnesses. One witness, and corroborating circumstances, are sufficient to convict.(6) The corroborative evidence need not be equivalent

(1) State *v.* Adams, 4 Blackf. 146; People *v.* Kelly, 38 Cal. 145; *Ex parte* Bridges, 2 Woods, 428.

(2) People *v.* Sweetman, 3 Parker C. C. 358; *contra*, Rump *v.* Commonwealth, 30 Pa. St. 475; State *v.* Whittemore, 50 N. H. 245.

(3) Stewart *v.* State, 22 Ohio St. 477.

(4) State *v.* Furlong, 26 Maine, 69; State *v.* White, 8 Pick. 453.

(5) Chamberlain *v.* People, 23 N. Y. 85; Montgomery *v.* State, 10 Ohio, 220.

(6) Galloway *v.* State, 29 Ind. 442; State *v.* Molier, 1 Dev. Law, 263

to the positive testimony of another witness; it is sufficient if the evidence together is sufficient to satisfy the jury beyond a reasonable doubt.(1) The fact that the accused has made two contradictory affidavits is not sufficient to convict him of perjury in either.(2) But he can be convicted upon mere proof of his confessions that his testimony was perjured.(3) It is not necessary to produce a living witness to testify to the falsity of the sworn statement; if the jury believe that the written evidence contained in the defendant's letters, recognized by him as genuine, proves he made a false, corrupt oath, he may be convicted.(4)]

SUBORNATION OF PERJURY.

The procuring another to take such a false oath as constitutes perjury in the principal.(*l*) The offense does not amount to subornation if that other does not actually take the false oath; but it is nevertheless punishable.

The punishment for subornation is the same as for perjury itself; and the same course has to be taken under the vexatious indictments act.(*m*)

BRIBERY.

The corrupt treatment of one intrusted with a public charge, to influence him in the discharge of his duty in that character.

The offense, which may be thus generally defined, comprises acts differing considerably from each other. They may be divided into two classes:

1. Where some person concerned in the administration of public justice(*r*) is approached by one bringing him a reward, in order to influence his conduct in his office.

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(1) Crusen *v.* State, 10 Ohio St. 258; State *v.* Heed, 57 Mo. 252.

(2) United States *v.* Mayer, Deady (Circuit of Oregon and California) 327.

(3) Regina *v.* Hook, Dearsley & Bell C. C. 606; 8 Cox C. C. 5.

(4) United States *v.* Wood, 14 Pet. 430.

(*l*) 4 Bl. 138.

(*m*) For a list of statutes applicable to perjury, etc., v. Arch. 866.

(*r*) v. *infra*, as to ministerial officers.

2. Where some person having it in his power to procure, or aid in procuring, for another a public place or appointment, is so approached.(*s*)

1. The offense of *offering* to, or *receiving* by, an officer, judicial or ministerial(*t*), an undue reward to influence his behavior in his office, is a misdemeanor punishable by fine and imprisonment. Both the giver and the taker are guilty. And though the reward be refused, the officer is equally punishable for the attempt. The offense is not restricted to the case of influencing the higher officers, such as judges or members of the government; but extends to those in a subordinate position; for example, constables, as if one bribe a constable to refrain from executing a warrant. A particular species of bribery, viz., corruptly influencing jurymen will be treated of hereafter under the title "Embracery."(*u*)

2. For the sake of convenience we may distinguish two varieties of this offense:—

i. When the place or appointment is in the gift of some public officer.

ii. When it is determined by public election.

i. This offense may also be regarded as following under the first class, inasmuch as the presentation to the place by the public officer is one of the duties of his office. The offense is a misdemeanor. Even the attempt to procure an appointment by offering a sum of money to a cabinet minister was punished as a misdemeanor.(*x*)

By particular statutes it has also been provided that persons selling public offices shall lose all right to the appointment, and the buyers shall not only be ejected, but also be disabled from ever holding such office.(*y*) Those buying or selling, or receiving or paying money or rewards for offices, are guilty of a misdemeanor.(*z*) So also are persons who do not thus directly buy or sell, but who pay money

(*s*) v. 1 Hawk., c. 67, §§ 1–3.

(*t*) The text books, in general, confine the offense of bribery to a bribery of judicial officers; but this definition of the offense seems too narrow. Arch. 870.

(*u*) v. p. 82.

(*x*) R. *v.* Vaughn, 4 Burr. 2494.

(*y*) 5 and 6 Edw. 6, c. 16, § 2; 49 Geo. 3, c. 126, § 1.

(*z*) 49 Geo. 3, c. 126, § 3.

for soliciting or obtaining offices, or any negotiations or pretended negotiations relating thereto.(a) Certain other offenses in connection with the traffic in offices(b) are dealt with, and certain exceptions are made; for example, the sale of commissions in the army.(c)

ii. Offenses against suffrage.

[As free and fair elections are the basis upon which the entire administration of public affairs in this country must rest, the statutes, both of the national government and of the states, are quite full in the prohibition of acts that interfere therewith. There is a substantial conformity in these acts. The requisites of suffrage are defined—which include citizenship, full age, residence for a designated length of time (ordinarily for a longer time in the state, and for a shorter time in the county, city, ward, or district), and, in some states, the ownership of property, the payment of a tax, or the ability to read. With few exceptions, the right to vote is confined to men.

The Ohio statute,(1) to take the law of one state for example, prohibits bribery; corrupting or intimidating electors; voting without having the requisite qualifications; voting more than once at the same election; voting without being restored to citizenship, after having been disqualified by conviction of crime; counseling or advising another to vote illegally; procuring, aiding, or advising another to come or go into any county, for the purpose of voting therein, knowing such person is not qualified to vote in such county; deceiving an elector who can not read, thereby preventing such elector from voting for such candidate as he intended; fraudulently putting a ballot into the ballot-box whether before or after the opening of the polls; also prohibits a judge of any election, after

(a) 49 Geo. 3, c. 126, § 4.

(b) As to what offices are within the statute, v. 1 Russ. 216; 3 Chitty, St. 465.

(c) It is almost needless to remind the reader that the force of this exception was taken away by the royal warrant of July, 1871, abolishing purchase. v. 34 and 35 Vict., c. 86.

(1) 74 Ohio L. 284–286.

the counting of votes commences, as required by law, from postponing the counting, or adjourning, or removing the ballot-box from the place of voting or from the custody and presence of all the judges of such election; from knowingly permitting any ballot fraudulently placed in the box, if the same can be designated, to be counted; from knowingly receiving or sanctioning the reception of the vote of a person not qualified, or the vote of a person who refuses to be sworn or to answer as required by law; from refusing, or sanctioning the refusal of any other judge of the same board, to administer any oath required by the election law; or from refusing to receive or sanctioning the rejection of a ballot from a person, knowing him to be qualified; also prohibiting any judge or clerk of election from willfully neglecting any duty imposed upon him by the election laws, or from being guilty of any corrupt conduct in the execution of the same; prohibiting any person from unlawfully obtaining, or attempting to obtain, possession of any ballot-box, or any ballots therein deposited, before the same are duly taken out and enumerated by the judges of election; prohibiting any person from unlawfully destroying, or attempting to destroy, any ballot-box used, any vote deposited, or any poll-book kept at any election; prohibiting any person from willfully, and with fraudulent intent, writing, or causing to be written, on any poll-book, tally-sheet, or list, lawfully kept, or any paper purporting to be such, or upon any election returns, or any book or paper containing the same, the name of any person not entitled to vote or not voting, or any fictitious name, with intent to prevent a fair expression of the will of the people; prohibiting any person from having in his possession any false or altered poll-book, tally-sheet, list, or return, knowing them to be such, with the same intent as above; and prohibiting any one from making or using marked ballots, to ascertain how another votes, or from distributing or knowingly voting any ballot not made in accordance with the provisions of law.

Of the above prohibited acts, the following are misdemeanors: Bribery; corrupting or intimidating electors;

voting without being a resident of the state one year, or without being a resident in the precinct twenty days, or being knowingly under twenty-one years of age, or being knowingly not a citizen of the United States, or being disqualified by conviction of crime and not restored; advising another to vote, knowing he is disqualified; the various acts prohibited to a judge or clerk of election, except the act of a judge knowingly permitting a fraudulent vote to be counted, and the use of marked ballots or ballots printed or written contrary to the provisions of law. The other prohibited acts are made felonies.

Multifarious as are the acts made criminal by these statutes, prosecutions do not appear to be frequent, and reported adjudications under them are not numerous. It has been decided that if the voter, at the proper place, delivers his vote to the proper officer, and is registered as having voted, he has voted, though the officer should, for safe-keeping, retain possession of the ballot till the polls close, instead of depositing it in the box.(1) If the election is determined to be void, there can be no criminal liability for having cast an illegal vote thereat.(2) Voting out of his ward is not illegal, under an act simply prohibiting voting out of the county, city, or town of his residence.(3) Defendant may be properly convicted of voting more than once at the same election, though one vote was cast in an election district where he did not reside.(4) Where a woman voted, supposing the amendments to the constitution of the United States gave her the right, that mistake of law was no defense to the indictment.(5) Ignorance of the law does not excuse; but, to convict a defendant of knowingly voting, while not being a qualified voter, it must be proved that he had knowledge of a state of facts that would disqualify him.(6) A minor can not be convicted of illegal

(1) Steinwehr *v.* State, 5 Sneed, 586.
(2) State *v.* Williams, 25 Maine, 561.
(3) Nettles *v.* State, 49 Ala. 35. (4) State *v.* Welch, 21 Minn. 22.
(5) United States *v.* Anthony, 11 Blatch. 200.
(6) McGuire *v.* State, 7 Humph. 54.

voting, if he voted under honest belief, induced by information from parents, relatives, or friends, that he had attained majority.(1) The Supreme Court of California held that a person who casts a second vote at an election, while so intoxicated that he has no knowledge he has voted before, has not the guilty intent to constitute a crime, and can not be convicted of the felony of voting twice at the same election.(2) C. J. Shaw, speaking for the Supreme Court of Massachusetts, held that, as domicile is often a complicated question, evidence that the defendant, in good faith and honest purpose to ascertain the right, makes a true statement of the case to a person capable of giving correct advice, together with evidence of the facts so stated, is competent, as bearing upon the question whether the defendant knew he had no right to vote.(3) On the other hand, it has been held that it is no defense against an indictment for willfully voting, when not a citizen, that the defendant took advice before voting.(4)

An indictment for illegal voting must state wherein the illegality consisted.(5) An indictment on the ground of not being a qualified elector must state what qualification the defendant lacked.](6)

EMBRACERY, ETC.

Embracery is an attempt to influence a jury corruptly to give a verdict in favor of one side or party, by promises, persuasions, entreaties, money, entertainments, and the like. Thus it appears to be a particular kind of bribery. A juryman himself may be guilty of this offense by corruptly endeavoring to bring over his fellows to his view. The offense is a misdemeanor, both in the person making the offense, and also in those of the jury who consent. The punishment, both at common law and by statute, is fine and imprisonment.(*n*)

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(1) Gordon *v.* State, 52 Ala. 308. (2) People *v.* Harris, 29 Cal. 678.
(3) Commonwealth *v.* Bradford, 9 Metc. 268.
(4) State *v.* Boyett, 10 Ill. 336; State *v.* Sheeley, 15 Iowa, 404.
(5) Gordon *v.* State, 52 Ala. 308. (6) Quinn *v.* State, 35 Ind. 485
(*n*) 6 Geo. 3, c. 50, § 61.

There are certain other acts interfering with the free administration of justice at a trial, which are considered as high misprisions and contempts, and are punishable by fine and imprisonment. Such are the following:

Intimidating the parties or witnesses.

Endeavoring to dissuade a witness from giving evidence, though it be without success.

Advising a prisoner to stand mute.

Assaulting or threatening an opponent for suing him; a counsel or attorney for being employed against him; a juror for his verdict; a jailer or other ministerial officer for what he does in the discharge of his duty.

For one of the grand jury to disclose to the prisoner the evidence against him.

There are three offenses, somewhat liable to confusion, which consist in an unlawful interference in another's suit, or stirring up such suits:

Common barratry; maintenance; champerty.

COMMON BARRATRY.

The offense of *frequently* inciting and stirring up suits and quarrels between her majesty's subjects, either at law or otherwise.(*o*) It is insufficient to prove a single act, inasmuch as it is of the essence of the offense that the offender should be a *common* barrator. Of course it is no crime for a man frequently to bring actions in his own right, though he be unsuccessful, unless they are purely groundless and vexatious.

The offense is a misdemeanor, punishable by fine and imprisonment. If the offender is connected with the legal profession, he is disabled from practicing for the future. If, having been convicted of this offense, he afterward practices, the court may inquire into the matter in a summary way; and on the subsequent practicing being proved, the offender may be sentenced to penal servitude to the extent of seven years.(*p*)

(*o*) 4 Bl. 134.

(*p*) 12 Geo. 1, c. 29, § 4, made perpetual

Another offense of a like nature may be noticed, namely, suing in the name of a fictitious plaintiff. If committed in the superior courts, it is a high contempt, punishable at their discretion. If in the inferior courts, it is punished by imprisonment for six months, and treble damages to the person injured.(*q*)

MAINTENANCE.

The officious intermeddling in a suit that in no way belongs to one, by *maintaining* or assisting either party with money or otherwise, to prosecute or defend it.(*r*) It is a misdemeanor punishable by fine and imprisonment.(*s*)

It has been declared to be maintenance to bear the whole or part of the expenses of the suit for another, or to retain a solicitor or counsel for him. But acts of this kind are justifiable in respect of an interest in the thing in variance, as that of a reversioner; of kindred or affinity; of other relations, *e. g.*, landlord and tenant, master and servant; of charity, *e. g.*, to enable a poor man to carry on his suit; of the profession of the law, *e. g.*, to act as counsel or solicitor. And it may be said generally that the courts would be very loth at the present day to declare an act of this kind to be an offense criminally indictable, unless some corrupt motive were manifestly present. This remark also applies to the next offense.

CHAMPERTY.(1)

Champerty is a species of maintenance. The distin-

(*q*) 8 Eliz., c. 2.

(*r*) Hawk., c. 83, § 23.

(*s*) This maintenance is sometimes termed *curalis*, to distinguish it from another species—*ruralis*, which latter consists in assisting another to his pretensions to lands, or holding them for him by force or subtility, or stirring up quarrels or suits in the county, in relation to matters wherein he is no way concerned. (Bac. Abr.) This seems to approach the crime of barratry.

(1) The statutes of Ohio, Indiana, and Iowa do not make maintenance or champerty criminal. In Indiana, common barratry is a misdemeanor. Rev. Stat. (1876), 466. And, in Ohio, it is a misdemeanor for any judge, justice of the peace, clerk of any court, sheriff, coroner, constable, or attorney to stir up suit or controversy between two or more persons, with intent to injure any such person. 74 Ohio L. 261.

guishing feature is, that the bargain is made with the plaintiff or defendant *campum partire*, that is, in the event of success to divide the land or other subject-matter of the suit with the champertor in consideration of his carrying on the party's suit at his own expense. Thus it has been held punishable as champerty to communicate such information as will enable a party to recover a sum of money by action, and to exert influence in procuring evidence to substantiate the claim, upon condition of receiving a portion of the sum recovered.(*t*)

COMPOUNDING OFFENSES.

A private individual is not obliged to set the law in motion for the prosecution of a criminal, though, as we shall see, he is punishable for the concealment of treason or felony.(*u*) Thus, merely to forbear to prosecute is no offense; there is wanting something else to constitute a crime, and this essential is the taking some reward or advantage.

Under this title we shall treat of compounding (a) felonies; (b) misdemeanors; (c) informations on penal statutes; noticing also the offense of taking rewards for helping to recover stolen goods.

(a.) *Compounding felony*, or forbearing to prosecute a felon on account of some reward received, is a misdemeanor, punishable by fine and imprisonment.(*v*) Of course the reward need not be of a monetary nature, but may be any advantage proceeding from or on behalf of the felon, and accruing to the person who forbears. The most common form of this crime is what was anciently known as *theft-bote*, that is, the forbearing to prosecute a thief, on consideration of receiving one's stolen goods back again, or other advantage. But the mere taking back stolen goods, without showing any favor to the thief, is no crime.

(*t*) Stanley *v.* Jones, 7 Bing. 369. (*u*) v. p. 87.

(*v*) It must be confessed that the English system, by leaving prosecutions to so great an extent in private hands, does its best to encourage this class of offense.

After the compounding, the compounder having prosecuted the felon to conviction, the judge directs an acquittal for the compounding.(*w*)

To corruptly take any reward for helping a person to property stolen or obtained, etc., by any felony or misdemeanor (unless all due diligence to bring the offender to trial has been used), is a felony punishable by penal servitude to the extent of seven years.(*x*) An advertisement offering a reward for the return of stolen or lost property, using words purporting that no questions will be asked, or seizure or inquiry made after the person producing the property, or that return will be made to any pawnbroker or other person who has bought or made advances on such property, renders the advertiser, printer, and publisher liable to forfeit £50 each.(*y*) But an action can not be brought to recover the forfeiture from the printer or publisher except within six months after the forfeiture is incurred; nor at all without the consent of the attorney or solicitor general.(*z*)

(b.) *Compounding misdemeanors* seems strictly to be illegal, as impeding the course of public justice. But *after conviction*, the court not uncommonly allows a course to be adopted which comes to the same thing. If the misdemeanor principally and more immediately affects an individual (such as one for which he might sue and recover in a civil action), as a battery, imprisonment, or the like, the court sometimes permits the defendant to *speak with the prosecutor*, before any judgment is pronounced; and if the prosecutor declares himself satisfied, inflict but a trivial punishment.(*a*) But this will not be allowed if the offense is of a more public nature.(*b*)

(c.) *Compounding informations upon penal statutes.*—In

(*w*) R. *v.* Stone, 4 C. & P. 379.

(*x*) 24 and 25 Vict., c. 96, § 101.

(*y*) Ibid., § 102.

(*z*) 33 and 34 Vict., c. 65, § 3.

(*a*) This course is pursued to reimburse the prosecutor for his expenses, and make him some private amends without the trouble and circuity of a civil action. But it surely is a dangerous practice. 4 Bl. 363.

(*b*) v. Keir *v.* Leeman, 6 Q. B. 308; 9 Q. B. 371.

order to promote the discovery and punishment of crime, many statutes imposing a penalty on the offender award the penalty, either in part or in whole, to any person who prosecutes, hence termed a *common informer*. It is clearly a gross abuse of this arrangement, not only tending to the escape of the offenders, but also encourage malicious threats of proceedings, for a person to take a reward on condition that he do not act as an informer. Accordingly it has been enacted that if any person informing, under pretense of any penal law, makes any composition without leave of the court, or takes any money or promise from the defendant to excuse him, he forfeits £10, and is liable to such imprisonment and further fine as the court shall award, and is forever disabled from suing on any popular or penal statute.(*c*) A person may be thus convicted of taking a reward for forbearing to prosecute, although no offense liable to a penalty has been committed by the person from whom the money is taken.(*d*)

MISPRISION OF FELONY.

Misprision of felony is the concealment of some felony (other than treason (*e*)) committed by another. There must be knowledge of the offense merely, without any assent; for if a man assent, he will either be a principal or an accessory. Thus, one will be guilty of misprision who sees a felony committed and takes no steps to secure the apprehension of the offender. The offense is a misdemeanor, punishable by fine and imprisonment.

EXTORTION AND OTHER MISCONDUCT OF PUBLIC OFFICERS.

Every malfeasance, or culpable non-feasance of an officer of justice, with relation to his office, is a misdemeanor punishable by fine or imprisonment, or both. Forfeiture of his office, if a profitable one, will also generally ensue. Under the term "officers of justice" are included not only the higher officers, as judges, sheriffs, but also those of a lower rank, as constables, overseers, etc.

(*c*) 18 Eliz., c. 5; 56 Geo. 3, c. 138, § 2.
(*d*) R. *v.* Best, 9 C. & P. 368. (*e*) Misprision of treason, v. p. 54.

As to *malfeasance:*(*i*) In cases of oppression and partiality the officers are clearly punishable; and not only when they act from corrupt motives, but even when this element is wanting, if the act is clearly illegal,(*k*) for example, for a magistrate to commit in a case in which he has no jurisdiction. The proceedings will generally be by impeachment, or information in the queen's bench, according to the rank of the offender; but an indictment will also lie.

Extortion, in the more strict sense of the word, consists in an officer's unlawfully taking, by color of his office, from any man, any money or thing of value that is not due to him, or more than is due, or before it is due.(*l*) But it is not criminal to take a reward, voluntarily given, and which has been usual in the case, for the more diligent or more expeditious performance of his duty.

As to *non-feasance:* An officer is equally liable for neglect of his duty as for active misconduct. Thus, an overseer is indictable for not providing for the poor.(*m*) A refusal by any person to serve an office to which he has been duly appointed, and from which he has no ground of exemption, is an indictable offense.

CONTEMPT OF COURT.

A contempt of court is a disobedience to the rules, orders, process, or dignity of a court which has power to punish such offenses. It is only courts of *record* that have power to fine and imprison for contempt of their authority.(*n*) The offense is by no means confined to what is popularly known as "contempt of court;" it includes a

(*i*) Bribery, v. p. 77.

(*k*) R. *v.* Sainsbury, 4 T. R. 451.

(*l*) 4 Bl. 141.

(*m*) v. also 11 Geo. 1, c. 4.

(*n*) Courts of record are those whose judicial acts and proceedings are enrolled in parchment for a perpetual memorial and testimony; which rolls are called the *records* of the court, and their truth can not be questioned. This power to fine and imprison is one of their chief distinguishing marks; and the very erection of a new jurisdiction with power of fine and imprisonment, makes it instantly a court of record. v. 3 St. Bl 269.

variety of acts, some of which appear to have only a remote connection with the courts.

Contempts may be divided into two classes:

1. *Direct*, "which openly insults or resists the powers of the court, or the persons of the judges who preside there."

2. *Consequential*, "which (without such gross insolence or direct opposition) plainly tend to create an universal disregard of their authority."

They may be also thus classified:

1. Those committed *in* the court itself; for example, by persistently applauding during a trial, or any other willful disturbance.

2. Those committed *out* of court; for example, by tampering with witnesses, jurors, etc.

The following are the chief instances:(*o*)

(a.) By *inferior judges and magistrates*—by acting unjustly, oppressively, or irregularly in their administration; or by disobeying writs issued out of the superior courts; by proceeding in a cause after it has been put a stop to or removed by writ of prohibition, *certiorari*, error, *supersedeas*, and the like. These are regarded as contempts of the superior courts (and especially the queen's bench division), which have a general superintendence over all inferior jurisdictions.

(b.) By *sheriffs, bailiffs, jailers, and other officers of the court*—by abusing the process of the law, or deceiving the parties by any acts of oppression, extortion, collusive behavior, or culpable neglect of duty.

(c.) By *solicitors*, who are also officers of the court—by gross instances of fraud and corruption, injustice to clients, or other dishonest practices.(*p*)

(d.) By *jurymen*—in collateral matters relating to the discharge of their office, as by making default when summoned; refusing to be sworn or to give any verdict; eating or drinking without the leave of the court, especially at the

(*o*) 2 Hawk., c. 22.

(*p*) As to a barrister, v. Ex parte Pater, 5 B. & S. 299.

cost of either party; and other misbehavior of a similar kind; but not in the mere exercise of their judicial capacities, as by giving a false or erroneous verdict.

(e.) By *witnesses*—by making default when summoned; refusing to be sworn or examined, or prevaricating in their evidence when sworn.

(f.) By the *parties* to any suit or proceeding before the court, who by force of fraud willfully prevent or obstruct the course of justice; also by disobedience to any rule or order, made in the progress of a cause; by non-payment of costs, or by non-observance of awards which have been made rules of court.

(g.) By *any persons*—including a great variety of acts which imply disrespect to the court's authority. Any riotous, noisy, or indecent conduct in court, calculated to interrupt the proceedings, or to bring discredit upon the court.

Of another class are those committed by the offender not present in court; for example, by disobeying or treating with disrespect the queen's writ, or the rules or the process of the court; by perverting such writ or process to the purposes of private malice, extortion, or injustice; by speaking or writing contemptuously of the court or judges, acting in their judicial capacity; by printing false accounts of causes then depending in judgment; and by any thing, in short, that demonstrates a gross want of that regard and respect, which, when once courts of justice are deprived of, their authority is entirely lost among the people.(q)

The proceedings on a contempt of court are of two kinds:

1. If the contempt is committed *in the face* of the court, the offender may be instantly apprehended and imprisoned, at the discretion of the judges, without any further proof or examination.

2. In the case of contempts committed *out* of court, if the judges see sufficient ground to suspect that a contempt has been committed, they either make a rule on the suspected party to show cause why an *attachment* should not

(q) As to contempt in general, see Miller *v.* Knox, 4 Bing. (N. C.) 574.

issue against him; or, in very flagrant cases, the attachment issues in the first instance.

[Power to punish contempts is inherent in courts of record. Hence, where a statute enumerates certain acts as punishable contempts, without expressly limiting the jurisdiction to such acts, the jurisdiction extends to others not enumerated. *In re* Moore et al., 63 N. C. 397; State *v.* Morrill, 16 Ark. 384. *Semble, contra:* Dunham *v.* State, 6 Iowa, 245. In Ohio, the jurisdiction was expressly restricted to cases named in the statute. 1 S. & C. 258. As it is in the federal courts. Rev. Stats. § 725. A publication, pending a suit, reflecting upon the court, is a punishable contempt. Hollingsworth *v.* Duane, Wall. C. C. 77; Brunson's case, 12 Johns. 460; Respublica *v.* Passmore, 3 Yeates, 438; *In re* Moore et al., 63 N. C. 397; State *v.* Morrill, 16 Ark. 384; People *v.* Wilson, 64 Ill. 195. *Contra: Ex parte* Hickey, 12 Miss. (4 Smed. & M.), 751; Dunham *v.* State, 6 Iowa, 245. Jurisdiction over such contempts, in Kentucky, is taken away by statute. Rev. Stat. (1877), 357.

Proceedings upon a contempt are criminal proceedings, though begun in a civil suit. United States *v.* Wayne, Wall. C. C. 134; People *v.* Craft, 7 Paige, 325; Whittem *v.* State, 36 Ind. 196. The judgment is not reviewable, unless such review is provided by statute. *In re* Cooper, 32 Vt. 429; Commonwealth *v.* Newton, 1 Grant (Penn.) Cas. 453. At least for contempt committed in open court. State *v.* Woodfin, 5 Ired. Law, 199; Easton *v.* State, 39 Ala. 551; Grove *v.* State, 24 Tex. 12; Casey *v.* State, 25 Tex. 380. Appellate court will not retry the question of contempt, but will correct the sentence, if that be illegal. Bickley *v.* Commonwealth, 1 J. J. Marsh. 575; Turner *v.* Commonwealth, 2 Metc. (Ky.), 619. No appeal, unless allowed by statute. Hunter *v.* State, 6 Ind. 423. But the right of appeal, in such cases, is given by the provision giving the right of appeal in all criminal cases. Whittem *v.* State, 36 Ind. 196. Can be reviewed in Michigan by writ of error. Rev. Stat. (1871), 1969; see People *v.* Simonson, 9 Mich. 492; Romeyn *v.* Caplis, 17 Mich. 449. Is reviewable on petition in error, in Ohio. Lowe *v.* State, 9 Ohio St. 337. In Ohio, a written charge of the matter alleged to be a contempt must be filed before adjudication and hearing allowed on it, even in case of contempt committed in open court, in presence and hearing of the court. Lowe *v.* State, 9 Ohio St. 337. In Kentucky, punishment for contempt shall not exceed a fine of thirty dollars, or imprisonment for thirty hours, unless the fact of contempt be first ascertained by verdict of a jury. Rev. Stat (1877), 356.

For full consideration of procedure in cases of contempt, see Cartwright's case, 114 Mass. 230, and Spinning et al. *v.* Ohio Trust Co., 2 Disney (Sup. Ct. Cin.), 354.]

CHAPTER V.

OFFENSES AGAINST THE PUBLIC PEACE.

MANY of the crimes mentioned in other chapters involve a breach of the peace. But the offenses now to be dealt with are those in which the breach of the peace is the prominent feature. In some—for example, in libel—at first sight the injury done to the individual appears to be the principal point; but a consideration of the way in which the law deals with the offense shows that it is otherwise. Thus, proof of the truth of a libel will not amount to a defense, unless it was for the public benefit that the matter should be published.

RIOTS.(r)

There are two minor offenses, which, as steps to the graver crime of riot, must first be noticed.

An *unlawful assembly* is any meeting of three or more persons under such circumstances of alarm, either from the large numbers, the mode or time of the assembly, etc., as in the opinion of firm and rational men are likely to endanger the peace; there being no aggressive act actually done.(s) All parties joining in and countenancing the proceedings are criminally liable. It is generally considered that the intention must be to do something which, if actually executed, would amount to a riot.(t) But a lawful assembly is not rendered unlawful by reason of the knowledge of those taking part in it that opposition will be raised to it, which opposition will in all probability give rise to a breach of the peace by those creating it.(u)

A *rout* is said to be the disturbance of the peace caused by those who, after assembling together to do a thing which, if executed, would amount to a riot.

(r) For riotous destruction of churches and other buildings, v. p. 266.

(s) R. v. Vincent, 9 C. & P. 91.

(t) For unlawful assemblies of another nature, v. p. 58.

(u) Beatty v. Gillbanks, 51 L. J. (M. C.) 117; 9 Q. B. D. 308.

A *riot* is a tumultuous disturbance of the peace by *three* or more persons ,assembling together of *their own authority*, with an intent mutually to assist one another against any who oppose them in the execution of some enterprise of a *private* nature, and afterward *actually executing* the same, in a turbulent manner, to the terror of the people, and this whether the act intended be of itself *lawful* or *unlawful*.(*u*)

An example will more clearly show the difference between these three crimes. A hundred men, armed with sticks, meet together at night to consult about the destruction of a fence which their landlord has erected: this is an unlawful assembly. They march out together, from the place of meeting, in the direction of the fence: this amounts to a rout. They arrive at the fence, and, amid great confusion, violently pull it down: this is a riot.

To constitute a riot, the object need not be unlawful, if the acts are done in a manner calculated to inspire terror. But there must be an unlawful *assembling;* therefore a disturbance arising among people already met together will be a mere affray; unless, indeed, there be a deliberate forming into parties. The object must be of a local or private nature; otherwise, as if to redress a public grievance, it amounts to treason.(*x*)

The gist of the offense is the *unlawful manner of proceeding*, that is, with circumstances of force or violence. Therefore assembling for the purpose of an unlawful object, and actually executing it, is not a riot, if it is done peaceably.(*y*)

These three offenses are misdemeanors, punishable by fine or imprisonment, or both.

For the case of riots which assume a more formidable aspect further provision is made by statute.(*z*) If twelve or more persons are unlawfully assembled to the disturbance of the peace, and being required by proclamation,(*a*) by a justice of the peace, sheriff, or under-sheriff, mayor,

(*u*) 1 Hawk., c. 65, § 1.
(*y*) v. 1 Hawk., c. 65.
(*a*) "Reading the riot act."
(*x*) v. p. 49.
(*z*) Riot act, 1 Geo. 1, st. 2, c. 5.

or other head officer of a town, to disperse, they then continue together for an hour after, they are guilty of felony, and liable to penal servitude to the extent of life, or imprisonment not exceeding three years.(*b*) It is a felony, attended by the same punishment, to oppose the reading of the proclamation; and this opposition will not excuse those who know that the proclamation would have been read, had it not been for this hindrance.(*c*) Prosecutions, under this act, must be commenced within twelve months after the commission of the offense.(*d*)

A course of proceeding founded on an old statute,(*e*) still unrepealed, is provided for offenses of this character. Any two justices, together with the sheriff or under-sheriff of the county, may come with the *posse comitatus* (*i. e.*, a force consisting of all able-bodied men except clergymen) and suppress a riot, rout, or unlawful assembly; may arrest the rioters; and make a record of the circumstances on the spot, which will be sufficient evidence of the conviction of the offenders. Any battery, wounding, or killing that may happen in suppressing the riot is justifiable.

AFFRAY.

A fighting between two or more persons in some *public* place, to the terror of her majesty's subjects; for example, a prize fight. If it takes place in private, it will be an assault. It differs from a riot, inasmuch as there must be three persons to constitute the latter, and also in not being premeditated.

Mere quarrelsome or threatening words do not amount to an affray; though, of course, according to first principles,(*f*) a person may be guilty of an affray, though he

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(*b*) 1 Geo. 1, st. 2, c. 5, § 1. The form of proclamation is prescribed by the statute: "Our sovereign lord, the king, chargeth and commandeth all persons being assembled, immediately to disperse themselves, and peaceably to depart to their habitations, or to their lawful business, upon the pains contained in the act made in the first year of King George, for preventing tumults and riotous assemblies. God save the king."

(*c*) Ibid., § 5.

(*d*) Ibid., § 8.

(*e*) 13 Hen. 4, c. 7.

(*f*) v. p. 36.

uses no actual force himself; for example, by assisting at a prize fight. The offense may be aggravated in several ways; for example, on account of its dangerous tendency, *e. g.*, a duel; on account of the position of the person against whom it is committed, *e. g.*, an arresting officer; on account of the place where it happens, *e. g.*, in a church or churchyard. In the last case, even quarrelsome words are punishable.

An affray may be suppressed and the parties separated by a private person who is present; and, of course, a peace officer is bound to interfere. The offense is a misdemeanor, punishable by fine or imprisonment, or both.

CHALLENGE TO FIGHT.

To challenge to fight, either by word or letter, or (b) to be the bearer of such challenge, or (c) to provoke another to send a challenge, is a misdemeanor, punishable by fine or imprisonment, or both. It is not necessary that actual fighting should follow. Provocation, however great, is no justification,(*g*) though it may mitigate the sentence of the court.

SENDING THREATENING LETTERS.

It is very obvious that the receipt of a threatening letter is not unlikely to lead to a breach of the peace on the part of the receiver. Therefore, to prevent such breach, and at the same time to punish what is an offense against the security of the subject, it has been provided that if any person, knowing the contents, sends or delivers any letter or writing, threatening to burn or destroy any house, barn, or other building, or grain or other agricultural produce in a building, or any ship; or to kill, maim, or wound any cattle, he is guilty of felony, and may be punished by penal servitude to the extent of ten years.(*h*) The same consequences are attached to sending letters threatening to murder.(*i*)

It will be convenient to notice here certain other cases

(*g*) R. *v.* Rice, 3 East, 581.
(*h*) 24 and 25 Vict., c. 97, § 50.
(*i*) Ibid., c. 100, § 16.

of sending threatening letters, though their nature admits also of their being treated of under the title "Larceny." If any person, knowing the contents, sends or delivers any letter or writing, *demanding with menaces*, and without reasonable cause, any chattles, money, or other property, he is punishable for the felony by penal servitude to the extent of life.(*k*) If the threatening be otherwise than by letter, the limit of the penal servitude is five years.(*l*) Sending a letter or writing, containing, to the knowledge of the sender, accusations or threats to *accuse any person of a crime* punishable by law with death or penal servitude for not less than seven years, or of an assault with intent to commit a rape, or of an attempt to commit a rape or an unnatural crime, is a felony, punishable by penal servitude to the extent of life.(*m*) The punishment is the same, though the threat to accuse of any of these crimes be not by letter.(*n*) It is immaterial whether the person threatened be innocent or guilty of the offense imputed to him,(*o*) inasmuch as the gist of the offense is the extortion. The same punishment is awarded in the case of one inducing another by violence or threats to execute a deed, etc., with intent to defraud.(*p*)

LIBEL AND INDICTABLE SLANDER.

Offenses of this class are rightly considered as affecting the public peace, inasmuch as their tendency is directly to provoke breaches of the peace. This will appear from the definition of a libel.

A libel is a malicious defamation, made public either by printing, writing, signs, pictures, or the like, tending either to blacken the memory of one who is dead, or the reputation of one who is alive, by exposing him (or his memory) to public hatred, contempt, or ridicule.(*q*)

(*k*) 24 and 25 Vict., c. 96, § 44. (*l*) Ibid., § 45.
(*m*) Ibid., § 46. (*n*) Ibid., § 47.
(*o*) R. *v.* Gardner, 1 C. & P. 479. (*p*) 24 and 25 Vict., c. 96, § 48.
(*q*) v. 1 Hawk., c. 73. This definition refers only to private libels, and not to those, already noticed, of a seditious, blasphemous, or indecent nature (v. pp. 55, 65). But in all cases of libel, the ground of criminal proceedings is the same, namely, "the public mischiefs which

To those who are aggrieved by a libel, two courses are open—either to prosecute the offender criminally by indictment or information, or to seek redress by a civil action. This is the general rule, but there are cases where the injured party has a remedy by action, though the wrong-doer is not criminally punishable. The principle is that whenever an action will lie for a libel, without showing special damage (in other words, where the particular injury to the individual is not the prominent feature, but the incitement to a breach of the peace is), an indictment will also lie. While, on the one hand, there are cases (the gist of which is the loss to the person libeled, and not the public offense) which are the subject of civil but not of criminal proceedings, on the other hand, sometimes a person is criminally, though not civilly, liable for what he has written. This is frequently the case, when the matter of the libel is true. It is a clearly established rule that, in a civil action, the truth of the matter is a good defense; whereas, in a criminal proceeding, it does not amount to a defense, unless it be proved that it was for the public benefit that the matter should be published. The gist of the crime is the provocation to a breach of the peace, by exciting feelings of revenge, etc. And the libel is not divested of this characteristic on account of its being founded on truth. However, even in a criminal proceeding, the truth may be inquired into, and the court, in pronouncing sentence, may consider whether the guilt of the defendant is aggravated or mitigated by the plea and evidence of the truth.(*r*)(1)

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libels are calculated to create, in alienating the minds of the people from religion and good morals, rendering them hostile to the government and magistracy of the country, and, where particular individuals are attacked, in causing such irritation in their minds as may induce them to commit a breach of the peace." 1 Russ. 321.

(*r*) 6 and 7 Vict., c. 96, § 6.

(1) In the states, generally, it is provided by statute, or by the constitution, that, in prosecutions for libel, the truth may be given in evidence, and if it also appear that the publication was made with good motives, and for justifiable ends, the defendant shall be acquitted. Constitution of Ohio, Bill of Rights, § 11; Illinois, Rev. Stat. (1877),

We have just remarked that whenever an action will lie for a libel, without laying special damage, an indictment will also lie. We may add that whenever an action will lie for verbal slander, without laying special damage, an indictment will lie for the same words, if reduced to writing and published. Thus, to see what writings are indictable, we may first enumerate the cases in which an action will lie without laying special damage:(*s*)

i. For all words spoken of another which impute to him the commission of a crime punishable by law.

ii. For all words spoken of another which may have the effect of excluding him from society; for example, to say that he has the leprosy.

iii. For writing and publishing any thing which renders another ridiculous or contemptible. But this must be taken with a certain amount of qualification; for a person will not be indictable for a literary criticism, though it makes the author appear ridiculous, if it does not exceed the limits of a fair and candid criticism, by attacking the personal character of the author.(*t*)

iv. For words used of a man which may impair or hurt his trade or livelihood; for example, to call a physician a quack.

Certain other writings are libelous. Such are those which vilify the character of deceased persons, if the intention has been to bring contempt on the families, or to stir up hatred against them, or to excite them to a breach of the peace.(*u*) So, also, writings tending to defame persons of position in foreign countries. Writings, though they do not reflect on the character of any particular individual, as, for example, on bodies of men, may be libelous if they tend

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374; also, Constitution of 1870, art. 2, § 4; Constitution of Michigan art. 6, § 25; Iowa, Rev. Stat. (1873), 641. In Indiana, the provision is the truth may be given in justification. Constitution, art. 1, § 10. In Iowa, the jury determines both law and fact, in prosecutions for libel. Rev. Stat. 641. In Illinois, the jury are judges of the law and the fact in all criminal cases. Rev. Stat. (1877), 405.

(*s*) Arch. 897.

(*t*) Macleod v. Wakeley, 3 C. & P. 311

(*u*) R. v. Topham, 4 T. R. 126

to a breach of the peace, or to stir up hatred toward a class generally.(*x*)

There are certain exemptions from the criminal liability which attaches to matter which is *prima facie* libelous. We have already seen that a fair literary criticism, however uncomplimentary and unpalatable, is not a libel. Confidential communications are also, in some cases, privileged; for example, by or to those occupying fiduciary positions, as where the defendant wrote to the *employes* of the plaintiff to inform them of the malpractices of the latter,(*y*) or when a master gives what he believes to be a correct character of his servant.(*z*) Communications made *bona fide*, with a view of investigating a fact, though injurious to a person's character, are not libelous; for example, an advertisement to ascertain whether the plaintiff had another wife living.(*a*) The meaning in law of a *privileged communication* is, a communication made on such an occasion as rebuts the *prima facie* inference of malice arising from the publication of matter prejudicial to the character of the plaintiff. But he may answer by proving malice in fact.(*b*)

[A fair account of a trial is a privileged communication. But *ex parte* affidavits or testimony do not come within the privilege; nor does the privilege cover matters which do not form part of the trial.(1) Criticism or expression of opinion upon admitted or established facts is privileged.(2) Liberty of discussion upon public matters is necessary, but libelous statements, made to injure one in office or a candidate for office, are not privileged.(3)]

It constitutes a more serious offense to embody the ob-

(*x*) R. *v.* Osborn, 1 Barn. K. B. 138, 166.

(*y*) Cleaver *v.* Senande, 1 Camp. 258, n.

(*z*) Edmonson *v* Stevenson, Bull. N. P. 8.

(*a*) Delaney *v.* Jones, 4 Esp. 191.

(*b*) Wright *v.* Woodgate, 2 C. M. & R. 573.

(1) Stanley *v.* Webb, 4 Sandf. 21; Edsell *v.* Brooks, 17 Abbott Pr. R. 221; Cincinnati Gazette Co. *v.* Timberlake, 10 Ohio St. 548.

(2) Fry *v.* Bennett, 3 Bosw. 200

(3) Littlejohn *v.* Greeley, 13 Abbott Pr. R. 41; Aldridge *v.* Press Printing Co., 9 Minn. 188; Hunt *v.* Bennet, 19 N. Y. 173.

jectionable matter in writing, than merely to give verbal utterance to it. So that an indictment (so also an action) may be maintained for words written, for which an indictment could not be maintained if they were merely spoken; for example, to write that a man is a swindler.(*c*) It may be stated generally on the subject of *indictable slander*,(*d*) that no words spoken, however scurrilous, even though spoken personally to an individual, are the subject of indictment; unless they directly tend to a breach of the peace; for example, by inciting to a challenge. We must here except words seditious, blasphemous, grossly immoral, or uttered to a magistrate while in the execution of his duty.

As to the *form* in which the libel is expressed, of course it will be none the less an offense because the libelous imputation is conveyed indirectly; for example, by a hint, question, exclamation, irony, etc. And a mere subterfuge, as by writing only a letter or two of the name, will not avail if there be satisfactory evidence of what person is meant. The words used are to be taken in the sense ordinarily understood. Where the libelous signification of the words does not appear on the face of the libel, innuendoes are inserted in the indictment, and proved by the evidence showing the intended application of the words.

As to the *publication*, or making public of the libel. To make a writing a libel it must be published; for the mere writing or composing of a defamatory paper which is never read or divulged to others, or which is delivered simply by mistake, will not amount to a libel. But, on the other hand, a slight circumstance will be sufficient to constitute a publication. Thus communication, though only to a single person, is a publication; and though it be contained in a private letter. We have only to recur to the gist of the offense to understand the reason of this; for, in each case, the act tends to a breach of the peace.

The mere publication of matter which on the face of it is libelous, is presumptive evidence of the malice which

(*c*) l'Anson *v.* Stuart, 1 T. R. 748.

(*d*) "Libel" is the term applied to words written. "Slander," to those merely spoken.

is necessary to constitute a crime; and therefore the proof of innocence of intention lies on the defendant. But if the writing is *prima facie* innocent, malice may be proved from special circumstances which may be laid before the jury.

The facts to be established by the prosecution are:

(a.) The making and publishing of the writing.

(b.) That the writing is libelous in its nature.

For a long period it was maintained by the judges and others that it was the province of the jury to deal with the first of these questions only, and that the second was to be determined by the court. But the controversy was settled by Fox's act,(*e*) which declared and enacted that it was for the jury to determine both questions. So that the jury now gives a verdict of guilty and not guilty on the whole matter in issue, and are not, as formerly, directed by the court to find the defendant guilty if they are satisfied that the writing was published and bore the meaning ascribed to it in the indictment.(*f*) But of course the court may state its opinion to the jury, though they are not bound to act upon it.

Every one who is concerned in the writing or publishing is liable to conviction for the libel. This doctrine has been carried to an absurd extent; so much so that it was held that a mere servant of the printer of a libel, who clapped down the press, was punishable, though it did not at all clearly appear that he knew the import of the paper, or that he was conscious he was doing any thing illegal.(*g*) But this rule has been doubted, though it shows that the court is prepared to go a long way.

The proprietor of a newspaper, or other principal, is answerable criminally as well as civilly for the acts of his

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(*e*) 32 Geo. 3, c. 60.

(*f*) As the law is now administered, it is a system of *ex post facto* legislation, applied by the jury to each particular case. A libel considered as a crime has been well described as any thing for having written which a jury thinks a man ought to be punished. Fitz. St. 147.

(*g*) R. *v.* Clark, 1 Barn. K. B. 304.

servant in the publication of a libel.(*h*) It would be exceedingly dangerous to hold otherwise; for then an irresponsible person might be put forward, and the person really producing the publication, and without whom it could not be published, might remain behind and escape altogether.(*i*) However, it is now provided that the defendant, principal or agent, may prove that the publication was made without his authority, consent, or knowledge, and that the said publication did not arise from want of due care or caution on his part.(*k*) Though the statute does not expressly say whether this is a competent defense, or only serves to mitigate punishment, it seems that it will completely rebut the *prima facie* presumption of publication.

A report published in any newspaper of the proceedings of a public meeting shall be privileged, if such meeting was lawfully convened for a lawful purpose and open to the public, and if such report is fair and accurate and published without malice, and if the publication of the matter complained of is for the public benefit; but this protection will not be allowed to a defendant who has refused to insert in the newspaper in which the libel appeared, a reasonable explanation or contradiction.(*l*)

Libel is a misdemeanor, punishable in the case of one who publishes a defamatory libel, knowing it to be false, by imprisonment not exceeding two years, and fine.(*m*) But if the prosecution do not prove that the defendant knew it to be false, the punishment is fine or imprisonment not exceeding one year, or both.(*n*)

No criminal prosecution can be commenced against any proprietor, publisher, editor, etc., for any libel published in any newspaper without the written fiat or allowance of the Director of Public Prosecutions, or of the Attorney-General. A court of summary jurisdiction may now inquire as to the libel being true or for the public benefit, etc.(*o*)

(*h*) R. *v.* Almond, 5 Burr. 2686.
(*i*) Per Tenderten, C. J. R. *v.* Gutch, Moo. & M. 433.
(*k*) 6 and 7 Vict., c. 96, § 7.
(*l*) 44 and 45 Vict., c. 60, § 2.
(*m*) 6 and 7 Vict., c 96, § 4.
(*n*) Ibid., § 5.
(*o*) 44 and 45 Vict., c. 60, § 3.

In case of private prosecutions, if judgment is given for the defendant, he is entitled to recover his *costs* from the prosecutor. And if the defendant has pleaded a justification of the libel (on the ground of truth, etc.), and so has put the prosecutor to extra expense, on his (the defendant) failing to establish his plea, the prosecutor can recover from him the cost occasioned by such plea.(*p*)

An offense which may be regarded as a particular form of libel is punishable in the same way, namely, hanging a person in effigy. The object is to bring contempt upon, or excite indignation against, an individual, and so to incite to a breach of the peace.

Another offense connected with libel may be noticed: Publishing, or threatening to publish, or proposing to abstain or prevent from publication, a libel in order to extort money or some other valuable thing, is a misdemeanor punishable by imprisonment not exceeding three years.(*q*)

FORCIBLE ENTRY OR DETAINER.

The violent taking, or, after unlawful taking, the violent keeping possession of lands and tenements with menaces, force, and arms, and without the authority of the law. It is no defense to a charge of forcible entry that the accused had been unjustly turned out of possession,(*r*) inasmuch as he has his remedy at law, and the fact of his right does not diminish the breach of the peace. If there be not employed such force as is calculated to prevent resistance, it is a mere trespass.(*s*)

The offense is a misdemeanor, punishable by fine and imprisonment. The court may summarily restore possession to the person entitled, by a writ of restitution.(*t*)

Blackstone notices certain other offenses which are punishable by fine and imprisonment as misdemeanors against the peace: Riding or going armed with dangerous or unusual weapons, spreading false news, false and pretended prophecies, with intent to disturb the peace.

(*p*) 6 and 7 Vict., c. 96, § 8.
(*q*) Ibid., § 3.
(*r*) 5 Rich. 2, c. 8.
(*s*) R. *v.* Smyth, 5 C. & P. 201.
(*t*) *v.* 21 Jac. 1, c. 15.

CHAPTER VI.

OFFENSES AGAINST PUBLIC TRADE.

It is in subjects treated of in this chapter, perhaps, that there is found the chief ground for the distinction between *mala in se* and *mala quia prohibita*. Certain of the offenses, free from any tinge of immorality, appear in the category of crimes only inasmuch as they have been forbidden by human laws. But, of course, in any case, an act is punishable by the law only in virtue of its being a breach of that law, and not on account of its moral quality.

SMUGGLING.

Smuggling is the importing or exporting either (a) goods without paying the legal duties thereon; or (b) prohibited goods. The existing law on the subject is contained chiefly in the customs consolidation act, 1853.(*s*)

The statute subjects to forfeiture the goods which have in any way been the subjects of smuggling practices(*t*). It also imposes certain pecuniary penalties,(*u*) and renders liable to imprisonment for specified periods, on summary conviction before a justice, every person found on board a ship liable to forfeiture by any act relating to the customs.(*v*)

The following offenses are declared felonies:

(a.) Being armed and assembled, to the number of three or more, for the purpose of aiding in the illegal landing, running, or carrying away of prohibited goods, or goods liable to duties not paid or secured; or in rescuing such goods after seizure; or in rescuing a person apprehended for a felony against the customs; or in preventing the apprehension of such person.(*x*)

(b.) Shooting at vessels belonging to the navy or revenue

(*s*) 16 and 17 Vict., c. 107.
(*t*) Ibid., § 209.
(*u*) Ibid., § 232.
(*v*) Ibid., § 235.
(*x*) Ibid., § 248.

service within a hundred leagues of any part of the United Kingdom, or shooting at or wounding an officer engaged in the prevention of smuggling.(*y*)

The punishment for these felonies is penal servitude from fifteen years to life, or imprisonment not exceeding three years.

(c.) Being found in company with more than four others, with prohibited goods; or in company with one other person, within five miles of the sea coast or of any navigable river, carrying offensive arms, or disguised in any way, is punishable by penal servitude to the extent of seven years.(*z*)

The following offenses are misdemeanors:

(a.) Assaulting or opposing an officer engaged in the prevention of smuggling in the execution of his duty, is punishable by penal servitude to the extent of seven years.(*a*)

(b.) Making signals, under certain circumstances, to smuggling vessels, is punishable by fine of £100, or imprisonment not exceeding one year.(*b*)

All proceedings for offenses against acts relating to the customs must be commenced within three years after the date of the offense.(*c*)

The act also contains provisions for facilitating the discovery of smuggled goods by searching suspected ships, carts, houses, etc.; it being lawful for the revenue authorities to fire on a ship which, when chased, does not bring to.(*d*)

COUNTERFEITING TRADE-MARKS.

This subject seems peculiarly to fall within a chapter dealing with offenses against trade, though it would also find a place under the heading "Forgery." The law as to offenses relating to trade-marks is contained in the merchandise marks act, 1862.(*o*)

Forging (additions to, and alterations of, trade-marks,

(*y*) 16 and 17 Vict., c. 107, § 249. (*z*) Ibid., § 250.
(*a*) Ibid., § 251. (*b*) Ibid., § 244. (*c*) Ibid., § 303
(*d*) Ibid., §§ 218–223. (*o*) 25 and 26 Vict., c. 88.

with intent to defraud, as well as fresh fabrications, being deemed forgeries) (*p*) a trade-mark, or falsely applying any trade-mark with intent to defraud,(*q*) or (ii), with like intent, applying a forged trade-mark to any bottle, case, wrapper, ticket, etc., in which any article is intended to be sold,(*r*) is a misdemeanor, punishable by imprisonment not exceeding two years, or by fine, or both.(*s*)

The articles to which the trade-mark is applied, and the instruments by which applied, are to be forfeited. No proceedings are to be taken after three years from the offense, or one from the first discovery.(*t*)

Selling goods having forged trade-marks thereon, knowing them to be forged, is an offense punished by a pecuniary penalty.(*u*)

Other offenses against trade, *e. g.*, false pretenses, embezzlement, cheating, etc., may more conveniently be treated of under the title "Offenses against Property." One class only of offenses remain to be noticed here, and that a somewhat complex and comprehensive one.

UNLAWFUL INTERFERENCE WITH TRADE BY COMBINATIONS, ETC.

It is perfectly legal for workmen to protect their interests by meeting or combining together, or forming unions, in order to determine and stipulate with their employers the terms on which only they will consent to work for them. But this right to combine must not be allowed to interfere with the right of those workmen who desire to keep aloof from the combination, to dispose of their labor with perfect freedom as they think fit.(*x*) Nor must it interfere with the right of the masters to have their contracts

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(*p*) 25 and 26 Vict., c. 88, § 5. (*q*) Ibid., § 2.
(*r*) Ibid., § 3. (*s*) Ibid., § 14. (*t*) Ibid., § 18. (*x*) Ibid., § 4.
(*x*) "The workmen who think it for their advantage to combine together in the disposal of their labor are no more justified in constraining any other workman, who does not desire such association, to combine with them—to bring his labor into common stock, as it were, with theirs—than an association of capitalists in constraining an individual capitalist to bring his capital into common stock with theirs '—Report of the Roy. Com. on Labor Laws, 1867.

duly carried out. Infraction of such rights will bring the wrong-doer within the pale of the criminal law of conspiracy.

The law on this subject is principally contained in the conspiracy and protection of property act, 1875.(*y*) It will be well to prefix a provision of the trades union act, 1871.(*z*) The purposes of any trade union shall not, by reason merely that they are in restraint of trade, be deemed to be unlawful so as to render any member of such trade union liable to criminal prosecution for conspiracy or otherwise.

The following acts are forbidden, and are punishable, on summary conviction or indictment, by imprisonment not exceeding three months, or penalty not exceeding £20.

i. For *any* (*a*) person, with a view to compel any other person to abstain from doing or to do any act which such other person has a legal right to do or abstain from doing—to wrongfully and without authority—

(a.) Use violence to, or intimidate, any such person, or his wife, or children, or injure his property.

(b.) Persistently following him about from place to place.

(c.) Hide his tools, clothes, or other property, or hinder him in the use thereof.

(d). Watch or beset his house, or other place where he resides, or works, or carries on business, or happens to be, or the approach thereto (commonly known as "picketing"), but not if the object be merely to obtain or communicate information.

(e.) Follow him, with two or more other persons in a disorderly manner in or through any street or road.(*b*)

ii. For a person employed by the municipal authorities, public companies, contractors, or others who have under-

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(*y*) 38 and 39 Vict., c. 86, repealing 34 and 35 Vict., c. 32, and other acts.

(*z*) 34 and 35 Vict., c. 31, § 2.

(*a*) This word makes the law of general application, and not restricted to trade disputes, though, of course, practically the offense will most frequently occur in connection therewith.

(*b*) 38 and 29 Vict., c. 86, § 7.

taken to supply gas or water, either alone or with others, willfully and maliciously to break his contract of service, knowing or having reasonable cause to believe that the probable consequence will be to deprive the inhabitants wholly or to a great extent of gas or water.(*c*)

iii. For a person willfully and maliciously to break his contract of service, knowing or having reason to believe that the probable consequence will be to endanger human life, or cause serious bodily injury, or expose valuable property to destruction or serious injury.(*d*)

An exceptional course in criminal procedure is allowed in the case of the last two offenses, namely, that on the hearing of an indictment or information for such offenses, the respective parties to the contract of service, their husbands or wives, are considered competent witnesses.(*e*) There is also another peculiarity with regard to the proceedings. Power is given to the offender to elect to have the case tried on indictment, and not by a court of summary jurisdiction.(*f*)

Trade disputes now form an exception to the general law of conspiracy in one point. If, in connection with such dispute, two or more combine to do something which, if done by one person, is not punishable as a crime, they will not, on account of their number, be indictable for the conspiracy at common law.(*g*)

It may be mentioned that assaults with intent to obstruct the sale of grain, or its free passage, or with force hindering any seaman, keelman, or caster from working at his lawful occupation, or beating or using violence with such intent, is punishable, on summary conviction, by imprisonment not exceeding three months.(*h*)

(*c*) 38 and 39 Vict., c. 86, § 4. (*d*) Ibid., § 5.

(*e*) Ibid. § 11.

(*f*) Ibid., § 9. "Making the fact of whether a particular offense is indictable or not depend on the will of the accused person, is a novelty in our jurisprudence, and, to say the least, productive of considerable practical inconvenience."—Davis' Labor Laws, p. 99.

(*g*) 38 and 39 Vict., c. 86, § 3. (*h*) 24 and 25 Vict. c. 100, §§ 39, 40

CHAPTER VII.

CONSPIRACY.

CONSPIRACY is a combination of two or more persons to do an unlawful act, whether that act be the final object of the combination, or only a means to the final end, and whether that act be a crime, or an act hurtful to the public, a class of persons, or an individual.

The gist of the offense is the *combination*.(*i*) Of this offense a single person can not be convicted, unless, indeed, he is indicted with others, who may, however, be dead or unknown to the jurors.(*j*) And, on the same ground, man and wife can not by themselves be convicted, for they are one person. Many acts, innocent if done by one person, become criminal if they are the result of agreement by two or more persons. Thus A. and B. each commit adultery under the same circumstances, the most aggravated and cruel. B.'s conduct differs from A.'s only in the fact that he gets C. to lend him a carriage for the purpose of elopement. A. is not, B. is, within the grasp of the criminal law.(*k*) We have just remarked that the gist of the offense is the agreement. A mere intention will not suffice to constitute the crime.(*l*) But if the agreement (the con-

(*i*) The law of conspiracy is the most complete illustration of the fiction consisting in treating as a crime not the very acts which are intended to be punished, but certain ways of doing them.—Fitz. St. 62.

(*j*) 1 Hawk., c. 72, § 8.

(*k*) "It is not apparent, at first sight, why conspiracy, which is one out of many possible aggravations of an act, should have been selected as the one by which its criminal character should be determined. . . . The probable explanation is, that in early times the most prominent conspiracies were usually attended with great violence, and that, in defining the crime, words were used which included offenses of much less importance than those which were originally contemplated."—Fitz. St. 62.

(*l*) Mulcahy *v.* R., L. R. 3 H. L. Ap. Ca. 306.

spiracy itself) can be proved, there is no need to prove that any thing has been done in pursuance of it. Of course, the existence of the unlawful agreement is generally evidenced by some overt acts, but these are evidence merely, and not material if the agreement can be proved otherwise.(*m*)

The definition shows a conspiracy to be an agreement to do an *unlawful* act. It is the indefinite meaning of this word "unlawful" that gives to the crime of conspiracy its wide extent. The widest discretion is intrusted to the judges, in whose power it seems to be thus to declare criminal combinations to do almost any thing which they regard as morally wrong, politically or socially dangerous, or otherwise objectionable.(*n*) Three classes of conspiracy may be distinguished:(*o*)

1. When the end to be accomplished would be a *crime* in each of the conspiring parties; in other words, a conspiracy to commit a crime. The case of murder is specially provided for by statute, the person conspiring being liable to penal servitude to the extent of ten years.(*p*) And by the same statute one who solicits, encourages, persuades, or endeavors to persuade, or proposes to any person to murder any other person, is liable to the same punishment. Such an offense is completed by the publication of an article in a newspaper, although not specifically addressed to any one person.(*q*)

2. When the ultimate purpose of the conspiracy is lawful, but the means to be resorted to are criminal, or, at the least, illegal; in other words, to effect a legal purpose with a corrupt intent or by improper means—for example, to support a cause believed to be just by perjured evidence; to break into another's house, in order to obtain one's property.

We have already noticed the case of trade conspiracies, and referred to an exception to the common-law doctrine in such matters.(*r*)

(*m*) R. v. Gill, 2 B. & Ald. 204.

(*n*) "It is not altogether inconvenient to have a branch of the law which enables the courts, by a sort of ostracism, to punish people who make themselves dangerous or obnoxious to society at large, and the necessity for quoting precedents—the publicity of the proceedings—and the general integrity of the judges, are probably sufficient safeguards against its abuse, but it would be idle to deny that the power is dangerous and ought to be watched with jealousy."—Fitz. St. 149.

(*o*) See Final Report of Roy. Com. on Labor Laws.

(*p*) 24 and 25 Vict., c. 100, § 4. (*q*) R. v. Most, 7 Q. B. D. 244.

(*r*) v. pp. 106–108.

3. Where, with a malicious design to do an injury, the purpose is to effect a wrong, though not such a wrong as, when perpetrated by a single individual, would amount to an offense against the criminal law. We may distinguish the following cases:

(a.) Falsely to charge another with a crime—whether from malicious and vindictive motives, or to extort money from him. But, of course, two or more persons may agree to prosecute a person against whom there are reasonable grounds of suspicion.

(b.) To do an act with intent to pervert the course of justice, for this is an injury to the public at large—for example, when two or more agree together that one of them shall be robbed by the others, in order that they may obtain the statutory reward for conviction.(*r*)

(c.) *Generally*— Wrongfully to injure or prejudice others, whether an individual, a body of men, or the public, in any other manner. The varieties of this offense are innumerable, but two or three examples will suffice: To injure a man in his trade; to raise the price of the public funds by false rumors; to violate morality and public decency by inducing a woman to become a common prostitute.(*s*) But it is said that not every combination to effect a tort is criminal; that wherever a combination to commit a civil injury has been held criminal, the injury has been malicious (using the term in the non-technical sense)—for example, a combination to pull down a fence would not be criminal, if the only object of the act were to try a question as to the right of way.(*t*)

Conspiracy is a misdemeanor, punishable by fine or imprisonment, or both; in the case of conspiracy to murder, by penal servitude to the extent of ten years.(*u*) This crime falls under the provision of the vexatious indictments act.(*x*)

[Conspiracy is punished as a misdemeanor of common

(*r*) R. *v.* Macdaniel, 1 Leach, 45.

(*s*) v. Arch. 980, for other instances.

(*t*) Rosc. 410; R. *v.* Turner, 13 East, 228.

(*u*) v. *supra*.

(*x*) v. p. 288.

law in Kentucky.(1) In Ohio, there are no crimes by force of the common law, and there is no statute making conspiracy a separate offense. In Indiana, combination by two or more persons to commit a felony is itself a felony.(2) The clause in this act which provides that it shall be unnecessary, in an indictment, to specify the felony which the combination proposed to commit, has been held unconstitutional.(3) In Illinois, conspiracy to falsely indict an innocent person is a misdemeanor; conspiring, with malicious intent, to wrongfully injure another, or obtain money or other property under false pretenses, or to do any illegal act, injurious to the public trade, health, morals, or the administration of justice, or to prevent competition in public contracts, or to commit any felony, or to commit any offense against the state, or any county, city, village, town, or township, is a felony.(4) In Michigan, conspiracy is not specifically named in the statutes, but it is enacted that every person who shall commit an offense indictable at common law, for the punishment of which no express provision is made by statute, shall be punished by fine and imprisonment in jail.(5.) In Iowa, conspiracy is the same as defined in Illinois, omitting the last clause, "to commit any offense against the state," etc., and is punished by imprisonment in the penitentiary, or by fine and imprisonment in jail.(6)]

If the purpose of the conspiracy is a felonious one, and *actually carried out*, the conspiracy is merged in the felony; so that after a conviction for the felony the defendant can not be tried for the conspiracy. But if the defendant is indicted for the conspiracy, he is not entitled to an acquittal, because the facts show a felony. Under such circumstances, however, he can not be subsequently tried for the felony unless the court has discharged the jury from giving a verdict on the misdemeanor.(*y*)

(*y*) 14 and 15 Vict., c 100, § 12.

(1) Christian *v.* Commonwealth, 13 Bush, 264; Commonwealth *v.* Blackburn, 1 Duv. 5.

(2) Rev. Stat., 1876, p. 451. (3) Landringham *v.* State, 49 Ind. 186.

(4) Rev. Stat., 1877, p. 355. (5) Ibid., 1871, p. 2152.

(6) Ibid., 1873, p. 638.

CHAPTER VIII.

OFFENSES AGAINST PUBLIC MORALS, HEALTH, AND GOOD ORDER.

UNDER this head will be noticed a somewhat miscellaneous class of offenses which are considered to affect the public rather than the individual; though some of them at first sight appear rather to concern particular persons, *e. g.*, bigamy. Throughout the whole of the criminal law there can be traced an unwillingness to resort to any thing characteristic of paternal government. As a rule, mere immorality is not punished until it invades the rights of others than those who participate in it, whether by public evil example or otherwise. Thus a mere falsehood is not punishable; but if it involves a fraud on another, then the law steps in with its punishment.

BIGAMY.(1)

The offense consists in marrying a second time, while the defendant has a former husband or wife still living.

Not only is the second marriage void, but it also constitutes a felony; and this whether the second marriage took place in the United Kingdom or elsewhere. There are certain cases which are excepted by the statute which declares the second marriage generally felonious:

i. A second marriage contracted elsewhere than in England or Ireland by any other than one of her majesty's subjects.

ii. A second marriage by one whose husband or wife has been continually *absent* from such person for the last seven years, and has not been known by such person to be living within that time. But if there is no proof that the husband and wife had ever separated, the prosecution is not bound to prove that the prisoner knew that his wife was alive within six years of the second marriage.(*z*)

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(1) U. S. Rev. Stat., § 5352.

(*z*) R. *v.* Jones, 11 Q. B. D. 118; 52 L. J. (M. C.) 96; 48 L. T. N. S. 768; 31 W. R. 800. See also R. *v.* Willshire, 14 Cox, 541.

iii. A second marriage by one who, at the time of such second marriage, was *divorced* from the bond of the first marriage.

iv. A second marriage by a person whose former marriage has been declared void by the sentence of any court of competent jurisdiction.(*z*)

In none of these cases is the second marriage a felony; but in the second case it is a mere nullity.

It is no defense to the charge of bigamy that the subsequent marriage would in any case have been void, as for consanguinity and the like.(*a*) but if the first marriage is void, the second will not be bigamous; otherwise if voidable only.(*b*) It has been recently settled that a *bona fide* belief by the prisoner at the time of the second marriage that her husband was then dead is no defense.(*c*)(1)

The first (*i. e.*, the real) wife or husband is not a compe-

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(*z*) 24 and 25 Vict., c. 100, § 57.

(*a*) R. *v.* Allen, L. R., 1 C. C. R. 376; 41 L. J. (M. C.) 101.

(*b*) R. *v.* Jacobs, 1 Mood. C. C. 140. (*c*) R. *v.* Gibbons, 12 Cox, 237.

(1) In Squire *v.* State, 46 Ind., it was held proper to instruct the jury that if they believe, from the evidence, that the defendant had been informed that his wife had been divorced, and that he had used due care and made due inquiry to ascertain the truth, and had reason to believe, and did believe, at the time of his second marriage, that his first wife had been divorced from him, then they should find for the defendant. On the contrary, it has been held that a felonious intent is not necessary, and that the accused may be found guilty, though she honestly and reasonably believed her first husband was dead. Commonwealth *v.* Mash, 7 Metc. (Mass.), 472, or was divorced. Davis *v.* Commonwealth, 13 Bush, 318. Though the marriage charged as bigamous be otherwise void, being between persons whose intermarriage is prohibited by law, yet it is sufficient to support an indictment for bigamy. People *v.* Brown, 34 Mich. 339. In most of the states it is held that the first marriage can be proved by the admissions of the accused. State *v.* Abbey, 29 Vt. 60; O'Neal *v.* Commonwealth, 17 Grattan, 582; State *v.* Britton, 4 McCord, 256; Langtry *v.* State, 30 Ala. 536: Finley *v.* State, 3 Head, 544; Stanglein *v.* State, 17 Ohio St 453; Squiro *v.* State, 46 Ind. 459. And by the admissions of the accused, coupled with proof of cohabitation. Commonwealth *v.* Jackson, 11 Bush, 679. But, *contra*: Gohagan *v.* People, 1 Parker's Crim. Cas. 378; People *v.* Lambert, 5 Mich. 349; State *v.* Johnson, 12 Minn. 476.

tent witness either for or against her or his consort; but of course the (so-called) second wife or husband is.

This felony is punishable by penal servitude to the extent of seven years. The man (or woman) who goes through the form of marriage with the bigamist does not altogether escape. He may be indicted as principal in the second degree, having been present aiding and assisting the woman in committing the felony; or at any rate as an accessory before the fact for counseling her to commit the crime.(*d*)(*e*)

INDECENT CONDUCT.

To this head may be referred the public and indecent exposure of the person, which may be treated as a common nuisance. Also the exposing for public sale or view any obscene book, print, picture, or other indecent exhibition. Both of these offenses are misdemeanors, and punishable by fine or imprisonment, or both.(*f*) Power is given to magistrates, under certain circumstances, to authorize the searching of houses and other places in which obscene books, etc., are suspected to be sold or otherwise published for gain, and to authorize their seizure and destruction.(*g*)

GAMING AND GAMING HOUSES.

The law does not deem it within its province to punish such practices as gaming, unless either some fraud is resorted to, or regular institutions are established for the purpose, so as to amount to a public nuisance.

As to *gaming*.—If any person by fraud or unlawful device, or ill practice, in playing, betting, or wagering, win

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(*d*) R. *v.* Brawn, 1 C. & K. 144.

(*e*) There are certain other offenses connected with marriage. By 4 Geo. 4. c. 76, § 21, and 6 and 7 Wm. 4, c. 85, §§ 39, 41, persons unduly solemnizing marriages are guilty of felony, v. 1 Russ. 959. Making false declarations, signing false notices or certificates of marriage, etc., are offenses attended by the penalties of perjury, 6 and 7 Wm. 4, c. 85, § 38. As to forging marriage licenses, v. "Forgery."

(*f*) 14 and 15 Vict., c. 100, § 29.

(*g*) 20 and 21 Vict., c. 83. As to indecent assaults, v. p. 149. Disorderly houses, etc., v. p. 119.

any sum of money or valuable thing, he is deemed guilty of obtaining money by false pretenses, and punished accordingly.(*h*)

Playing or betting by way of wagering or gaming in any street, road, highway, or other open and *public place*, or in any open place to which the public have access, at or with any table or instrument of gaming, or any card, token, or other article used as an instrument of wagering at any game or pretended game of chance, subjects the player to the punishment of 5 Geo. 4, c. 83, as a rogue and vagabond; or else, at the discretion of the magistrate, to a penalty not exceeding 40s. for the first offense, and £5 for any subsequent offense.(*i*)

A railway carriage in transit where gaming is carried on is a "public place" or an "open place to which the public are permitted to have access.(*k*)

The subject of lotteries will be considered under the head "Nuisances."

As to *gaming houses*.—Houses of this description are regarded as so detrimental to public morality and good order, that they are classed among public nuisances. As such, the keepers are guilty of a common-law misdemeanor, and liable to fine or imprisonment, or both.

The chief steps taken by the legislature to suppress the evils of gaming houses are the following: An early statute prohibited the keeping of any common house for dice, cards, or other unlawful games, under a penalty of forty shillings for every day, and six and eight pence for every time of playing.(*l*) Subsequent statutes included other games under heavier penalties.(*m*) By a later statute(*n*) the statute of Henry VIII. is repealed, as far as it prohibited bowling, tennis, or other games of mere skill. Further provision was also made by the act of this reign against those who own or keep common gaming houses. The owner or keeper, and every person having the care and management of such house, and also every banker, crouper, and other person in any

(*h*) 8 and 9 Vict., c. 109, § 17. (*i*) 36 and 37 Vict., c. 38, § 3.

(*k*) Langrish *v.* Archer, 10 Q. B. D. 44; 52 L. J. (M. C.) 47; 47 L. T. N. S. 548; 31 W. R. 183.

(*l*) 33 Hen. 8, c. 9, § 11.

(*m*) *v.* 9 Anne, c. 14; 12 Geo. 2, c. 28; 18 Geo. 2, c. 19; 18 Geo. 2, c. 34.

(*n*) 8 and 9 Vict., c. 109, amended by 17 and 18 Vict., c. 38.

manner conducting the business of the house, is liable, on conviction before two justices, to a penalty not exceeding £500, in addition to the penalty under 33 Hen. 8; or may be committed to prison for a period not exceeding six months.(*o*)

If any person who has been concerned in the unlawful gaming, on his examination as witness, makes true disclosure to the best of his knowledge, he is entitled to receive a certificate, and is free from all consequences of his unlawful act up to that time.(*p*)

Betting houses, rooms, offices, or places, are deemed gaming houses within this statute. Persons receiving deposits on bets in such house incur a penalty of £30, or imprisonment for three months. Exhibiting placards or handbills, or otherwise advertising betting house, is punished by a penalty of £30, or imprisonment for two months.(*q*) A wooden box in an inclosed space on a race-course, commonly known as "the ring," is a betting place.(*r*)

The fact that the entrance of a peace officer is obstructed or delayed, or that the place is found provided with means of gaming, or of concealing instruments of gaming, is evidence that the house is a common gaming house. Penalties are imposed for such obstructions and for certain other offenses.(*s*)

COMMON OR PUBLIC NUISANCES.

Another offense of wide and vaguely-defined limits is now to be considered. In its definition its extent is indefinite; but in practice it is confined to certain classes of acts which interfere with the normal state of order and comfort.

Common nuisances are such annoyances as are liable to affect all persons who come within the range of their operation. They consist of acts either of commission or of omission; that is, causing something to be done which annoys the community generally, or neglecting to do something which the common good requires. Public nuisances are opposed to private nuisances, which annoy particular individuals only; that is, to which all persons are not lia-

(*o*) 8 and 9 Vict., c. 109, § 4. (*p*) Ibid., § 9.

(*q*) 16 and 17 Vict., c. 119.

(*r*) Galloway *v.* Maries, 8 Q. B. D. 275; 51 L. J. (M. C. 53; 45 L. T. N. S. 763.

(*s*) 17 and 18 Vict., c. 88.

ble to be exposed. The distinction is one based on the extent of the operation of the evil, and not one relating to the class of evil; inasmuch as all kinds of nuisances which, when injurious to private persons, are actionable as private nuisances, when detrimental to the public welfare, are punishable on prosecution as public nuisances. It is for the jury to determine whether a sufficiently large number of persons are or may be affected so as to make the nuisance "common" or "public."(*s*)

Common nuisances are indictable as misdemeanors. They do not give rise to civil action by every one who is subjected to the common annoyance. But if any one can prove special damage; that is, that he is affected, in some respect, in a way in which the public generally are not, he may pursue his civil remedy and obtain damages.

Another course of proceeding is sometimes available in nuisances, namely, *abatement* or removal of the nuisance by the party's own act. In private nuisances this is commonly allowed to be done by the party aggrieved; but in public nuisances the right is more confined. They may be abated by boards of health and other public bodies specially authorized under various public acts;(*t*) but private individuals can not resort to this course if the abatement involves a breach of the peace; and, in any case, they can only interfere so far as is necessary to exercise the right of passing, etc.

The principal classes of public nuisances will be briefly noticed:

i. Nuisances to *highways, bridges, and public rivers.*—These annoyances may be either *positive*, by actual obstruction; or *negative*, by want of reparation. In the latter case, only those persons are liable whose duty it is to keep the road, etc., in repair. The former class consists of a variety of offenses; for example, laying rubbish on the road, digging trenches in it, diverting part of a public river, etc.

ii. *Carrying on offensive or dangerous trades or manufactures.*—Manufactures which are injurious to the health or

(*s*) R. v. White, 1 Burr. 333. (*t*) v. 38 and 39 Vict., c. 55.

merely offensive to the senses as nuisances; and it is no defense that the public benefit outweighs the public annoyance.(*u*) But if a noxious trade is already established in a place remote from habitations and public roads, and persons come and build near, or a new road is made, the trade may be continued.(*x*) The presence of other nuisances will not justify any one of them; but a person can not be indicted for setting up a noxious manufacture in the neighhood in which other offensive pursuits have long been borne with, unless the inconvenience to the public is greatly increased.(*y*) No length of time will legitimate this or other kinds of nuisances, but the consideration of time may sometimes concur with other circumstances to prevent the character of nuisance from attaching.(*z*)

Nuisances which affect the public health are dealt with in the numerous statutes which treat of that subject.

iii. *Houses, etc., which interfere with public order and decency.*—The following places are nuisances, and, upon indictment, may be suppressed, and their owners, keepers, or ostensible managers punished by fine or imprisonment, or both. Disorderly inns(*a*) or alehouses; bawdy houses; gaming and betting houses;(*b*) unlicensed or improperly conducted playhouses, booths, stages for dancers, and the like.

Prosecutions for keeping a bawdy house or gaming house fall within the provisions of the vexatious indictments act.(*c*)

iv. *Lotteries.*—All lotteries were declared by statute (*d*) public nuisances. State lotteries were, however, authorized by successive acts of parliament until 1824, when they were discontinued, the state being thus enabled, without inconsistency, to enforce the already-existing law against other lotteries.

(*u*) R. *v.* Ward, 5 L. J. (K. B.) 221. (*x*) R. *v.* Cross, 2 C. & P. 483.

(*y*) R. *v.* Neil, 2 C. & P. 485; v. R. *v.* Neville, Peake, 91

(*z*) Weld *v.* Hornby, 7 East, 199.

(*a*) If a traveler is refused entertainment without sufficient cause the inn is liable to be treated as a disorderly inn.

(*b*) v. p. 116. (*c*) v. p. 288.

(*d*) 10 and 11 Wm. 3, c. 17.

v. A vast number of other acts, etc., have been declared public nuisances; for example, exposing in a public thoroughfare persons afflicted with infectious disease; allowing mischievous dogs to go abroad unmuzzled, provided that, if they were not of a description to be generally dangerous, the owner was aware of their nature; keeping fierce animals in places open to the public; keeping hogs near a public street; keeping a corpse unburied; making great noises in the street at night; eaves-dropping, that is, "listening under walls or windows, or the eaves of a house, to hearken after discourse, and thereby to frame slanderous and mischievous tales;" common scolds; and, in general, any thing which is an appreciable grievance to the public at large.

There are two cases, at least, where there might be a doubt as to the person who is criminally responsible for a nuisance. The landlord is liable if he erects a building which is a nuisance, or the occupation of which is likely to produce a nuisance. The master or employer is liable for a nuisance caused by the acts of his servants if done in the course of their employment.

ADULTERATION AND UNWHOLESOME PROVISIONS.

Mixing, or ordering, or permitting other persons to mix, color, etc., any article of food with any material injurious to health, with intent that the same may be sold in that state, is punishable for the first offense by a penalty of £50; the second offense is a misdemeanor, punishable by imprisonment not exceeding six months.(*o*) The same consequences attend the adulteration of drugs, so as to affect injuriously the quality or potency of such drugs.(*p*) In either case the person is excused if he can prove absence of knowledge. The defendant is discharged if he can prove that he bought the article in the same state as he sold it, with a warranty.(*q*)

WANTON AND FURIOUS DRIVING.

Any one having the charge of any carriage or vehicle, who, by wanton or furious driving or racing, or by willful misconduct, or by willful neglect, does or causes to be done any bodily harm to another, is guilty of a misdemeanor, and is liable to imprisonment not exceeding two years, or fine, or both.(*r*)

(*o*) 38 and 39 Vict., c. 63, § 4.
(*p*) Ibid., § 5.
(*q*) Ibid., § 25.
(*r*) 24 and 25 Vict., c. 100, § 35.

CHAPTER IX.

OFFENSES RELATING TO GAME.

[The English game laws are made for the protection of land-owners having parks, preserves, or warrens. They are made to give security to a species of property. They prohibit the unlawful taking or destroying game at certain places, at all seasons of the year; that is, the taking or destroying by unprivileged persons. The laws passed in the various states of this country, are to prevent the extirpation of game, and, in general, prohibit the killing or snaring of specified birds and animals, except within specified limits of time. The limits vary with the habits of the different species of game named. The killing of certain insectivorous birds, and of certain birds of special beauty or song, as well as the robbing of their nests, is absolutely prohibited at all times.(1) The prohibited killing of game is a misdemeanor. It is also a misdemeanor to sell, or have in possession for sale, any game during the period when the killing thereof is prohibited.(2)]

(1) 74 Ohio L. 371; Rev. Stat., Kentucky, 1877, p. 921; Rev. Stat., Indiana, 1876, p. 488; Rev. Stat., Illinois, 1877, p. 527; Rev. Stat., Mich., 1871, p. 680.

(2) The same acts as above, and Rev. Stat., Iowa, 1873, p. 632.

OFFENSES AGAINST INDIVIDUALS.

OFFENSES which immediately affect individuals, are regarded as crimes, and not merely as violations of private rights, on several grounds. First, because they are considered as contempts of public justice and the crown; secondly, because they almost always include in them a breach of the public peace: thirdly, because, by their example and evil tendency, they threaten and endanger the subversion of all civil society.(i)

Offenses against individuals may be divided into two classes: those—

Against their *persons*.

Against their *property*.

(i) 4 Bl. 176.

PART II.

OFFENSES AGAINST INDIVIDUALS.

THEIR PERSONS.

It is needless to remark that offenses against the person vary considerably in their enormity and in their consequences. In this department especially anomalies occur, which are apparently productive of great inequality. It is here, perhaps more than elsewhere, that the interference of what may be termed "extraneous circumstances" determines the character and gravity of the offense. We have seen that the intent is the index to the quality of the act; and if the intent could always be correctly arrived at, of course such circumstances would be left out of consideration. And even as it is, it is difficult to see why certain contingencies, entirely out of the control of the accused, should affect his position in the most vital manner. For example, the same intent may result in murder, or wounding with intent to murder, according to the skillfulness of the surgeon who treats the wounded man. It is, however, obviously expedient, with our defective means of guaging the intent, to punish more seriously the completed crime, so that, in cases where this consideration would have any effect, the criminal may be induced to stop short or to resort to the less serious deed.

Again, it is the law that a person can not be convicted of murder if the death does not ensue within a year and a day from the date of the blow or wound. It seems hard to explain why there should still be an arbitrary line thus

drawn; and why it should not be left to the jury to decide whether the death was the direct result of the wound. This seems to be another case of interference with the province of the jury. Again, it is plain that a surgeon's skill has very much to do with the recovery of the injured person.(*k*)

(*k*) v. R. v. Holland, 2 M. & R. 351.

CHAPTER I.

HOMICIDE.

HOMICIDE—the destroying of the life of a human being—includes acts varying from those which imply no guilt at all to those which constitute the greatest crime and meet with the extreme punishment of the law. Three kinds of homicide are usually distinguished, each class admitting of subdivisions:

Justifiable: Excusable: Felonious.

It may be stated, at the outset, that if the mere fact of the homicide is proved, the law presumes the malice which is necessary to make it felonious; and, therefore, it lies on the accused to show that it was justifiable or excusable.

Justifiable homicide, that is, where no guilt, nor even fault attaches to the slayer. For one species of homicide the term "justifiable" seems almost too weak, inasmuch as not only is the deed justifiable, but also obligatory. Three cases of justifiable homicide are recognized:

i. Where the proper officer executes a criminal in strict conformity with his legal sentence. A person other than the proper officer (*i. e.*, the sheriff or his deputy), who performs the part of an executioner, is guilty of murder. The criminal must have been found guilty by a competent tribunal; so that it would be murder otherwise to kill the greatest of malefactors. The sentence must have been legally given; that is, by a court or judge who has authority to deal with the crime. If judgment of death is given by a judge who has not authority, and the accused is executed, the judge is guilty of murder. The sentence must be strictly carried out by the officer (*i. e.*, the sentence as it stands after the remission of any part which the sovereign thinks fit), so that if he beheads a criminal whose sentence is hanging or *vice versa*, he is guilty of murder. Though

the sovereign may remit a part of the sentence, he may not change it.

The two following instances of justifiable homicide are permitted by the law as necessary; and the first, at least, as for the advancement of public justice.

ii. When an officer of justice, or other person acting in his aid, in the legal exercise of a particular duty, kills a person who resists or prevents him from executing it. Homicide is justifiable, on this ground, in the following cases: (*l*) (a) When a peace officer, or his assistant, in the due execution of his office, whether in a civil or a criminal case, kills one who is resisting his arrest or attempt to arrest. (b) When the prisoners in jail, or going to jail, assault the jailer or officer, and he, in his defense, to prevent an escape, kills any of them. (c) When an officer, or private person, having legal authority to arrest, attempts to do so, and the other flies, and is killed in the pursuit. But here the ground of the arrest must be either a felony, or the infliction of a dangerous wound.(1) (d) When an officer, in endeavoring to disperse the mob in a riot or rebellious assembly, kills one or more of them, he not being able otherwise to suppress the riot. In this case the homicide is justifiable both at common law and by the riot act.(*m*)

In all these case, however, it must be shown that the killing was apparently a necessity.

But it is not difficult to instance cases in which the officer would be guilty (a) of *murder*, for example, if the killing in pursuit, as above, were in case of one charged with a misdemeanor only, or of one required merely in a civil

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(*l*) v. 4 Bl. 179. (*m*) 1 Geo. 1, st. 2, c. 5.

(1) "If, after notice of intention to arrest the defendant, he either flee or forcibly resist, the officer may use all necessary means to effect the arrest." 2 Revised Stats. Indiana (1876), 379.

"When the arrest is being made by an officer, under the authority of a warrant, after information of the intention to make the arrest, if the person to be arrested either flee or forcibly resist, the officer may use all necessary means to effect the arrest." Rev. Stats Iowa (1873), 606

suit; (*n*) (b) of *manslaughter*, for example, if the killing, in case of one charged with a misdemeanor, were occasioned by means not likely to kill, as by tripping up the fugitive's heels.

iii. When the homicide is committed in *prevention* of a forcible and atrocious crime. Such crimes, it is said, are the following: Attempting to rob or murder another in or near the highway, or in a dwelling-house; or attempting burglariously to break a dwelling-house in the night-time. In such cases, not only the owner, his servants, and members of his family, but also any strangers present are justified in killing the assailant. But this justification does not apply to felonies without force, *e. g.*, pocket-picking; nor to misdemeanors of any kind.

A woman is justified in killing one who attempts to ravish her; and so, too, the husband or father may kill a man who attempts a rape on his wife or daughter, if she do not consent. And even if the adultery is by the consent of the wife, the husband, taking the offender in the act and killing him, is guilty of manslaughter only.

It is said that the party whose person or property is attacked is not obliged to retreat, as in other cases of self-defense, but he may even pursue the assailant until he finds himself or his property out of danger.(*o*) But this will not justify a person firing upon every one who forcibly enters his house, even at night. He ought not to proceed to the last extremity until he has taken all other possible steps. In fact, the conduct of the other must be such as to render it necessary, on the part of the one killing, to do the act in self-defense.(*p*) This brings us very near to the line which separates jutisfiable from excusable homicide; in fact it is difficult to distinguish between this and excusable homicide *se defendendo*. It may be questioned whether the distinction between justifiable and excusable is a substantial one; whether the cases under the former are not extreme cases of *se defendendo*.

Excusable homicide.—We have just intimated that there

(*n*) v. R. *v.* Dadson, 20 L. J. (M. C.) 57.

(*o*) Fost. 273; 1 Hawk., c. 28, §§ 21, 24. (*p*) R. *v.* Bull, 9 C. & P. 22.

is little if any ground for the distinction between justifiable and excusable homicide. Perhaps there may be something in this, that in the former case the killer is engaged in an act which the law enjoins or allows *positively*, while in the latter he is about something which the law *negatively* does not prohibit.(*q*) In neither case is there the malice which is an essential of a crime. In former times, a very substantial difference was made between the two kinds of homicide. That styled "excusable" did not imply that the party was altogether excused; so much so that Coke says(*r*) that the penalty was death. But the earliest information which the records supply shows that the defendant was entitled to a complete pardon, and the restitution of his goods; but he had to pay a sum of money to procure this award. Now it is expressly declared by statute(*s*) that no forfeiture or punishment shall be incurred by any person who kills another by misfortune or in self-defense, or in any other manner without felony.

The two kinds of so-called excusable homicide are homicide in self-defense; homicide by accident or misfortune.

i. *Se defendendo*, upon sudden affray.—We have noticed above the case of a man killing another when the latter is engaged in the performance of some forcible crime. What we have now to deal with is a kind of self-defense, the occasion of which is more uncertain in its origin, and in which it seems natural to impute some moral blame to both parties. It happens when a man kills another, upon a sudden affray, in his own defense, or in defense of his wife, child, parent, or servant, and not from any vindictive feel-

(*q*) The reason usually given is that in both the forms of excusable homicide there may be some degree of blame attributable. In the first case, *i. e.*, self-defense, inasmuch as in quarrels usually both parties are to some extent in fault; in the second, *i. e.*, accident, the party may not have used sufficient caution. But to visit the act under all circumstances with the punishments due to what *may* have happened is obviously unjust.

(*r*) 2 Inst. 148, 315.

(*s*) 24 and 25 Vict., c. 100, § 7, re-enacting 9 Geo. 4, c. 31, § 10.

ing. This is one species of what is called *chance* (casual) or *chaud* (in heat) *medley.*(*t*)

To bring the killing within this excuse, the accused must show that he endeavored to avoid any further struggle, and retreated as far as he could, until no possible, or at least probable, means of escaping remained; that then, and not until then, he killed the other in order to escape destruction. It matters not that the defendant gave the first blow, if he has terminated his connection with the affray by declining further struggle, before the mortal wound is given. Of course, the defense must be made by the person assaulted, while the danger is imminent; for if the struggle is over, or the other is running away, this is revenge, and not self-defense. Nor will a retreat of the nature indicated avail, if the blow is the result of a concerted design, as in the case of a duel, where the two parties have agreed to meet each other, and one, having retreated as far as he can, kills the other in protection of himself. Nor will it avail, if there has been a blow from malice *prepense*, and the striker has retreated and then killed the other in his own defense.(1)

As the definition shows, the killing in defense of those standing in the relation of husband and wife, parent and child, master and servant, is excused; the act of such person who interferes being construed as the act of the party himself.

(*t*) The term is sometimes applied to the killing of a person by one engaged in the commission of an unlawful act, without any deliberate intention of doing any mischief; also to any manner of homicide by misadventure.

(1) "I take the rule to be settled, that the killing of one who is an assailant must be under a reasonable apprehension of loss of life or great bodily harm; and the danger must appear so imminent, at the moment of the assault, as to present no alternative of escaping its consequences, but by resistance. Then, the killing may be excusable, even if it turn out afterward that there was no actual danger." Logue *v.* Commonwealth, 2 Wright (Penn.), 265. "The guilt of the accused must depend on the circumstances as they appear to him." Regina *v.* Thurborn, 1 Den C. C. 387.

The distinction between this kind of homicide and the crime known as manslaughter is sometimes very subtle. It may be stated in this form: That, in the former, the slayer could not otherwise escape, if he would; in manslaughter, he would not escape if he could. In other words, in the former case, the accused has done all that he can to avoid the struggle or its continuation; in the latter, the killing is done in the actual combat.(*u*)

ii. *Per infortunium*, by misadventure.—When a person doing a lawful act, without any intention of hurt, by accident kills another; as, for example, a man is at work with a hatchet, the head flies off by accident, and kills a bystander.

To bring the slaying within the protection of the excuse, the act about which the slayer is engaged must be (a) a lawful one. For, if the slaying happen in the performance of an illegal act, it is manslaughter, at least—and murder, if such act is a felony.(*v*). It must also (b) be done in a proper manner. Thus, it is a lawful act for a parent to chastise his child, and, therefore, if the parent happen to occasion the death of the other, if the punishment be moderate, the parent will be innocent, as *per infortunium*. But if the correction exceeds the bounds of moderation, either in the manner, the instrument, or the quantity of the punishment, and death ensues, it is manslaughter, at the least, and, in some cases, murder. Thus, it will, as a rule, be murder, if the instrument used is one likely to cause death; manslaughter, if the instrument is not of such a character, though an improper one.

The act must also (c) be done with due caution to prevent danger; and therefore with more caution by those

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(*u*) The books notice one species of homicide *se defendendo*, in which it is said that the party slain and the party slaying are equally innocent, though the act is deliberately done, and there is no actual combat. The instance usually given is that of two shipwrecked persons clinging to a plank which is capable of holding one only. One thrusts the other off, causing him to be drowned. This is justifiable, or, at least, excusable, homicide.

(*v*) v. R. *v.* Hodgson, 1 Leach, 6.

using dangerous instruments or articles. Due caution is such as to make it improbable that any danger or injury should arise from the act to others. Thus, throwing stones from a house, whereby the death of some one is caused, may be murder, manslaughter, or homicide by misadventure; murder, if the thrower knew that people were passing, and gave no notice; manslaughter, if a time when it was not likely that any people were passing; excusable homicide, if in a retired place, where persons were not in the habit of passing, or not likely to pass.(*x*) It has been said that, to be criminal, the negligence must be so gross as to be reckless,(*y*) but it is impossible to define culpable or criminal negligence.

Felonious homicide, or homicide coupled with a felonious intention, is capable only of a negative description—the killing of a human creature of any age or sex, without justification or excuse. The human creature killed may be either one's self or another.

SUICIDE OR SELF-MURDER.

Suicide is the felony of murder, inasmuch as it is the murder of one of the sovereign's subjects. To be such offense, the act must be committed deliberately, and by one who has arrived at years of discretion, and is in his right mind. The supposed absence of the last requisite is often taken advantage of by a jury guilty of "an amiable perjury," in order to save the reputation of the deceased. In fact, sometimes their verdicts show they deem the very act of suicide evidence of insanity.

Not only is he guilty of suicide, who, in pursuance of a fixed intention, takes away his life, but also he who, maliciously attempting to kill another, occasions his own death; as where a man shoots at another, and, the gun bursting, he kills himself. But if a man is killed at his own request, by the hand of another, the former is not deemed in law a *felo de se*, though the latter is a murderer.

If one persuades another to kill himself, and he does so,

(*x*) Fost. 262. (*y*) R. v. Noakes, 4 F.& F. 921, n.

the adviser is guilty of murder. So, also, if two persons agree to commit suicide together, if one escapes and the other dies, the survivor is guilty of murder,(*a*) though it is extremely doubtful whether he would be executed.

At one time the punishment for this crime was an ignominious burial in the highway, without Christian rites, with a stake driven through the body; and the vicarious punishment of his friends by the forfeiture of all his goods and chattels to the Crown. But some time back the law was altered, the only consequence being the denial of Christian burial, the *felo de se* being buried in the churchyard or other burying-ground, within twenty-four hours after the inquest, between the hours of nine and twelve at night.(*b*) And now not only is the ignominious burial in the highway prohibited, but the interment of such a person may be made in any manner authorized by the Burial Laws Amendment Act, 1880.(*c*) The forfeiture has been done away with in this as well as in other kinds of felony.(*d*)

An attempt to commit suicide is not an attempt to commit murder within the offenses against the person act,(*e*) but still remains a common-law misdemeanor.

The felonious killing of *another* is either murder or manslaughter. In dealing with the crime of murder, we shall anticipate, to some extent, the law of manslaughter, a great part of the law on the subject consisting in a distinction of the two crimes.

MURDER.

Murder is popularly regarded as the gravest crime known to the law. As a rule it would occupy the same position, regarded both from a moral and from a legal point of view. But that this is not always the case, an example will serve to show. Both of the following acts are murder, and punishable by death. A man, having received a slight insult from

(*a*) R. *v.* Dyson, R. & R. 523 (*b*) 4 Geo. 4, c. 52, § 1.

(*c*) 45 and 46 Vict., c. 19, §§ 2, 3.

(*d*) 33 and 34 Vict., c. 23. "Suicide may be wicked, and is certainly injurious to society, but it is so in a much less degree than murder. The injury to the person killed can neither be estimated nor taken into account. The injury to survivors is generally small. It is a crime which produces no alarm, and which can not be repeated. It would, therefore, be better to cease altogether to regard it as a crime, and to provide that any one who attempted to kill himself, or who assisted any other person to do so, should be liable to secondary punishment."—Fitz. St. 121.

(*e*) 24 and 25 Vict., c. 100, § 15.

another, dogs his path for six months, and, with all circumstances of aggravation, kills him in cold blood. A man carrying a gun sees a hen, and resolves to shoot and then appropriate it; he shoots, and by accident wounds a person who has come upon the scene; the wounded man dies nine months afterward, though his life might have been saved if he had submitted to an operation, or if the physician had been more skillful. But, on the other hand, there is one mode of depriving of life which is at least equally culpable, viewing the matter morally, but which is not regarded as murder, namely, taking away a man's life by perjury.(*d*)

We may adopt Coke's definition of murder for the purpose of explaining the crime: "When a person of sound memory and discretion unlawfully killeth any reasonable creature in being and under the king's peace with malice aforethought, either express or implied."(*e*)

(a.) *The offender must be of sound memory and discretion.*—Thus are excluded all idiots, lunatics, and infants, in accordance with the rules as to capability of committing crimes which have already been set forth.(*f*) To which we may add, that a person would be guilty of manslaughter at the most if he were not conscious that the act done was one which would be likely to cause death.(*g*) Of course the person procuring an idiot to commit murder, or, indeed, any crime, is guilty himself of the crime.

(b.) *Unlawfully killeth;* that is, kills without justification or excuse.—As we have seen, the presumption is against the accused, and it is for him to purge the act of its felonious character by proving such justification or excuse.

It is perfectly immaterial what may be the particular form of death, whether poisoning, striking, starving, drowning, or any other.(*h*) Any act, the probable consequence of which may be, and eventually is, death, is murder, though no stroke be struck, and, what is more noticeable, though the killing be not primarily intended; for example, when a mother hid her child in a pig-stye, where it

(*d*) R. *v.* Macdaniel, Fost. 131. (*e*) 3 Inst. 47.
(*f*) v. p. 21. (*g*) R. *v.* Vamplew, 3 F. & F. 520.
(*h*) As to swearing away a man's life, v. p. 75, n.

was devoured.(*i*) So if one, under a well-grounded apprehension of personal violence, does an act which causes his death, as for instance, jumps out of a window, he who threatens is answerable for a consequences.(*k*) A person may also be guilty through mere non-feasance; as if it was his duty and in his power to supply food to a child unable to provide for itself, and the child died because no food was supplied.(*l*)

It is no defense to show that the deceased was in ill-health and likely to die when the wound was given.(*m*) Nor is it a defense that the immediate cause of death was neglect on the part of the doctor, or the refusal of the party to submit to an operation; though it would be otherwise if the death were caused by improper applications to the wound, and not the wound itself.(*n*) To make the killing murder, the death must follow within a year and a day after the stroke or other cause; for if the death is deferred for that length of time, the law will presume that it arose from some other cause.

If a person is indicted for one species of killing, *e. g.*, poisoning, he can not be convicted by evidence of a totally different species of death, *e. g.*, starving. But if the difference consists only in a detail, *e. g.*, whether the instrument was a sword or an ax, this is immaterial.

As a general rule, proof is required of the finding of the body of the deceased. But this rule is not inflexible, as where the direct evidence brought before the jury is sufficiently strong to satisfy them that a murder has really been committed.

(c.) *Any reasonable creature in being and under the king's peace.*—Therefore killing a child in its mother's womb is no murder,(*o*), but it is otherwise if the child is born alive and dies from wounds or drugs received in the womb. [An infant is not the subject of murder until its connection with the mother is severed and an independent circulation has been established. Prior to that time, the life of the child

(*i*) 1 Hale, P. C. 433.
(*k*) R. *v.* Evans, 1 Russ. 426.
(*l*) R. *v.* Friend, R. & R. 20.
(*m*) R. *v.* Martin, 5 C. & P. 130
(*n*) R. *v.* Holland, 2 M. & R. 351.
(*o*) But v. p. 150.

even after it is born, is substantially fœtal, which the law distinguishes from independent life.(1)] "Under the king's peace" excludes only alien enemies who are actually engaged in the exercise of war.(*p*)

(d.) *With malice aforethought.*—The term "malice" is a most difficult one. It is used in various and conflicting senses, and the mind is apt to slide from the one to the other. The simple etymological signification of "wickedness" may generally be disregarded. In another sense, as we have seen,(*q*) malice, taken as equal to criminal intention, is of the essence of every crime. Therefore this view of the word will not serve to distinguish one crime from another. The murder-malice is usually described as "aforethought" or "*prepense*," but this addition, in itself, will not help us to any better understanding of the state of mind required to constitute murder.(*r*)

That this malice aforethought is not what its name seems to imply—malevolence or ill-will toward the deceased—is manifest, when we consider that perhaps the majority of murders are committed with a view to robbery; or, again, when we remember that murder can be committed, though the murderer has not the slightest wish to injure, or has not the slightest knowledge of the deceased, as in the case mentioned above of shooting at the fowl; nay, more, we can conceive of the case of a person being convicted of the murder of his dearest friend or relative. What, then, is this superior degree of malice? It may be said to be a felonious design or intention in general.(2.) This intention may

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(*p*) 1 Hale, P. C. 433. (*q*) v. p. 13.

(*r*) "The word 'aforethought' is unfortunate; 'willful and malicious' homicide would be better. The word 'aforethought' countenances the popular error that a deliberate premeditated intent to kill is required in order to constitute the guilt of murder, whereas it is only one out of several states of mind which have that effect. It is, moreover, an unmeaning word, for the thought, the state of mind, whatever it is, must precede the act; and it precedes it equally, whether the interval is a second, or twenty years."—Fitz. St. 118.

(1) State *v.* Winthrop, 43 Iowa, 519.

(2) Malice is "a settled intention to harm." Star Chamber Cases, A. D. 1630, p. 5. It was resolved by the judges, in Regina *v.* Maw-

be sometimes regarded as unfixed or floating (as in the fowl case). The deed causing death is done, and at the same

gridge, Kelyng, 119, see p. 127, that "malice is a design formed of doing mischief to another." "Malice, in its legal sense, denotes a wrongful act done intentionally without just cause or excuse." Littledale, J., in McPherson *v.* Daniels, 10 B. & C. 272. Malice "means any wicked or mischievous intention of the mind." Best, J., in Rex *v.* Harvey, 2 B. & C. 268. "A wrongful act done intentionally and without just cause, denotes malice, *i. e.*, furnishes evidence of malice." Nichols *v.* Commonwealth, 11 Bush, 496. "Malice is the intentional doing of a wrongful act without just cause or excuse." State *v.* Wiemers, 66 Mo. 13. The definition given by Littledale, J., is adopted by the courts in Canada. McIntyre *v.* McBean, 13 U. C., Q B. 542; Poitevin *v.* Morgan, 10 L. C. J 97.

Malice in general seems to be a willful intention to do unlawful injury; and the malice requisite to constitute murder, to be either an intention to commit a felony, or to do grievous bodily harm. In many of the United States, the malice required by statute to constitute murder, is either an intention to kill, or an intention to commit one of the four great felonies, rape, arson, robbery, or burglary. And in some states, by statute, there can be no murder without an intention to kill. But the intention to kill required by statute, is intention to kill a person, not any particular person; so that it is murder though the death of one person was intended, and the blow, missing its aim, killed another person. Wareham *v.* State, 25 Ohio St. 601.

There are certain presumptions of fact, or disputable presumptions of law, in prosecutions for homicide. The mere fact of killing being established, malice is presumed; hence, if the killing be proved, and no circumstances of extenuation be shown, the accused must be held by presumption guilty of murder at common law. When there are two degrees of murder, he is, in such case, presumed guilty of murder in the second degree. Where intent to kill is essential to constitute murder, proof of killing by a weapon or implement calculated to produce death, in the absence of proof of other circumstances, raises the presumption of murder, and in the second degree. But it can seldom happen, that an abstract killing or killing with a deadly weapon, is proved without proof of some attendant circumstances. And where attendant circumstances are proved, they must "be taken into consideration. And if, the homicide being conceded, no excuse or justification is shown, it is either murder or manslaughter; and, if the jury, upon all the circumstances, are satisfied, beyond a reasonable doubt, that it was done with malice, they will return a verdict of murder; otherwise, they will find the defendant guilty of manslaughter." Commonwealth *v.* Hawkins, 3 Gray, 463. "As an abstract proposition, where the circumstances of a homicide are not known, further than the mere fact that the death was caused by the use of a deadly

time to it is attached this movable quality. It must be noticed that this murder-malice is not a motive. The motive is to get the gold, hatred, etc. It is a difficult matter to give a description of malice which will apply to all cases of murder, of so various character are they, and so built up on individual decisions.

At the risk of confusing our idea of this essential of murder, we must mention the ordinary distinction between *express* and *implied* malice. But here it will be no easy matter to suppress the tendency to revert to the moral view of malice, which is always lurking about ready to make its appearance.

The true ground of distinction, if it is necessary to make one, seems to have been apprehended in the Indian penal code.(*s*)

Express malice may be said to be the *positive possession* of an intention:

i. Of causing death.

ii. Of causing such bodily injury as the offender knows is likely to cause death, *e. g.*, beating with an iron bar.

iii. Of causing bodily injury, and the bodily injury intended to be inflicted is sufficient, in the ordinary course of nature, to cause death.(*t*)(1)

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weapon, we do not deny that the jury may, from such fact alone, infer both malice and a purpose to kill. But where the attending circumstances are shown in detail, some of which tend to disprove the presence of malice or purpose to kill, it is misleading and erroneous to charge a jury that in such case the law raises a presumption of malice and intent to kill from the isolated fact that the death was caused by the use of a deadly weapon. In such case, the presence of malice or intent to kill must be determined from all the circumstances proven, including, of course, the character of the weapon." Erwin *v.* The State, 29 Ohio St. 191.

(*s*) Article 300.

(*t*) Express malice is generally described as that "when one with a sedate and deliberate mind, and formed design, doth kill another; which formed design is evidenced by external circumstances discovering that inward intention; as lying in wait, antecedent menaces, former grudges, and concerted schemes to do him some bodily harm.' —1 Hale, P. C. 451. But this does not at all square with the legal idea of malice.

(1) The deceased, being in liquor, had gone at night into a glass-

Implied malice may be said to be the possession of a general intention of such a nature, *implied* from the acts of the offender, or a wanton running of a risk by a person committing an act, who knows that it will probably cause death, or bodily injury which may cause death, without any excuse for incurring such risk.(*a*)

As to the punishment of murder, nothing further need be said here than that the sentence is death;(*b*) with regard to which, and its execution, particulars will be given in another chapter. Accessories after the fact to murder are liable to penal servitude to the extent of life.(*c*)

On an indictment for murder, the jury may convict the prisoner of manslaughter, or, of course, of an attempt to murder; but not of an assault.(*d*) And so a person charged as accessory after the fact to murder, may be convicted as accessory to manslaughter, if the principal felon be convicted of manslaughter only.(*e*)

[Where the common-law rule prevails, that there can be no conviction of a misdemeanor under an indictment for felony, there can be no conviction of assault and battery under an indictment for murder. But under a statute providing that if, upon an indictment for felony, the jury acquit the accused of part of the charge, and convict him of the residue, he shall be sentenced for any crime substantially charged in such residue, there may be a conviction of assault and battery under an indictment for manslaugh-

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house, and laid himself down on a chest; and while he was there asleep, the prisoners, workmen in the glass-house, covered and surrounded him with straw, and threw a shovel-full of hot cinders upon his belly, the consequence of which was, the straw ignited and he burned to death. Patterson, J., charged the jury, "if they believed the prisoners really intended to do any serious injury to the deceased, although not to kill him, it was murder; but if they believe their intention to have been only to frighten him in sport, it was manslaughter." Errington's Case, 2 Lewin, 217.

(*a*) The example usually given of implied malice, namely, that of a man willfully poisoning another, seems, indeed, to be a case of express malice, as there most certainly is an evil intention present. The truth is, that in this example also, there is a recurrence to the motive view of malice; in fact, the authority (1 Hale, P. C. 455) proceeds: "In such a deliberate act the law presumes malice, though no particular enmity can be proved."

(*b*) 24 and 25 Vict., c. 100, § 1. (*c*) Ibid, § 67.

(*d*) As to conspiracy to murder, v. p. 110.

(*e*) R. v. Richards, L. R. 2 Q. B. 311; 46 L. J. (M. C.) 200.

ter. Commonwealth *v.* Drum, 19 Pick. 479. A conviction of assault and battery, under an indictment for murder, was held valid in State *v.* Kennedy, 7 Blackf. 233, which case was overruled in Wright *v.* State, 5 Ind. 527, and this overruling was confirmed in Gillespie *v.* State, 9 Ind. 380. Where it was held, in Ohio, that the jury may, if justified by the evidence, find the defendant guilty of assault and battery only, under an indictment for murder, the court say, "It is true, that if death resulted from the unlawful assault and battery, the assailant was guilty of manslaughter; but the jury might have found that it resulted from some other cause. Had the court charged the jury, that if they found that the death resulted from the assault and battery, they could not properly find him guilty of assault and battery only—the charge would have been right." Marts *v.* State. 26 Ohio St. 162.]

MANSLAUGHTER.

The unlawful killing of another without malice, either express or implied. The malice referred to here is the murder-malice, at the meaning of which we have been endeavoring to arrive.

In this crime, again, we shall find acts varying to the ut most in their moral gravity and offensiveness. Perhaps on no other charge do persons more often appear in the dock and leave it without a stain on their characters. To take one class of examples: it constantly happens, after an accident in a mine or on a railway, that some of those engaged in the management of the one or the other are required to meet a charge of manslaughter which is preferred against them.

Two kinds of manslaughter are distinguished—

i. Upon a sudden heat (termed *voluntary*).

ii. In the commission of an unlawful act (termed *involuntary*).(*a*)

(*a*) The objectionableness of the terms "voluntary" and "involuntary," as opposed to each other, to denote varieties of the same crime, is obvious. There is no such thing as an involuntary crime. If the

i. *Voluntary* (so-called).—The distinguishing mark of this sort of manslaughter is the provocation giving rise to sudden anger, during which the deed causing death is done. If upon a sudden quarrel two persons fight, and one of them kills the other, the former will be guilty of manslaughter only, unless there are special circumstances which indicate evil design. But the act will be viewed in the less serious light of manslaughter only as long as the outburst of passion continues; not that the struggle need take place on the spot, for if the two at once adjourn to another place to fight, it will still be only manslaughter. So, also, in other cases of grave provocation, as if one man pulls another's nose, or is taken in adultery with another's wife. But here again, on the same grounds, to reduce the homicide to manslaughter, the cause of death must be inflicted at once, whilst the provocation is still exercising full influence. Otherwise the slaying will be regarded as a deliberate act of revenge.(*b*) It is needless to add that the plea of provocation will not avail if the provocation was sought for and induced by the slayer.

The instrument used when the person is acting under provocation is also a material consideration. It may be said that the provocation must be of the gravest nature to render guilty of manslaughter only one who uses a deadly weapon, or otherwise shows an intention to do the deceased grievous bodily harm. But a slighter provocation will suffice if the instrument used is one not likely to cause death, as a stick, or a blow with the fist. In fact the mode of resentment must bear a reasonable proportion to the provocation to reduce the offense to manslaughter.(*c*)

Manslaughter is to be distinguished from homicide in self-defense on sudden affray. In the latter, the ground for the blow, etc., is the necessity to take such a step for self-preservation; in the former, this necessity does not exist, but its place is taken by a sudden accession of ill-will.

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action be not a voluntary one it is not criminal. (v. p. 16.) What seems to be meant is that in the one case death is anticipated, in the other it is not.

(*b*) R. v. Hayward, 6 C. & P. 157. (*c*) R. v. Steadman Fost. 292.

ii. *Involuntary* (so-called) when the death, not being intended, is caused in the commission of an unlawful act. By this is meant that the unlawfulness of the act in which the accused is engaged is the ground of the homicide being regarded as manslaughter, and not homicide by misadventure merely. In the cases mentioned above under voluntary manslaughter, the death is caused by an unlawful act, but there that is not the distinguishing mark of the manslaughter. By "unlawful" here must be understood what is *malum in se*, and not what is merely *malum quia prohibitum*. Thus, then, if a man shooting at game by accident kills another, it is homicide by misadventure only, even although the party is not qualified.(*d*)

Here, again, we may observe that it is immaterial whether the unlawfulness is in the act itself or (that which comes to the same thing) in the mode in which it is carried out. It must also be borne in mind that if the unlawful act is a felony, the homicide amounts to murder. An instance of manslaughter in the commission of an unlawful act is furnished when one person kills another while the two are playing at an unlawful game; of manslaughter in doing a lawful act in an unlawful manner—when a workman throws down stones into a street where persons may but are not likely to be passing.

One form of doing an act in an unlawful manner is *negligence*. This consideration very frequently presents itself in manslaughter. It may be said, generally, that whatever constitutes murder, when done by fixed design, constitutes manslaughter, when it arises from culpable negligence; for example, when a near-sighted man drives at a rapid rate, sitting at the botton of his cart, and thereby causes the death of a foot passsenger.(*e*) Again, when a person, without taking proper precautions does an act which is dangerous, though not unlawful in itself, as, for instance, shooting at a target from a distance of 100 yards with a rifle sighted at 950 yards, in the course of which he kills another person, although at a spot distant 393 yards from the firing point, he does a criminal act which in the law amounts to manslaughter.(*f*) A large class of cases is that in which the death ensues from the treatment of disease. The man, whether a medical practitioner or not, is not indictable unless his conduct is marked by gross ignorance or gross inattention.(*g*) Mere neglect on the part of a parent to provide medical aid for his child of tender years, in consequence of which his child dies, is not manslaughter, unless it is proved affirmatively

(*d*) Fost. 259. (*e*) v. R *v.* Walker, 1 C. & P. 320.
(*f*) R. *v.* Salmon, 6 Q. B. D. 79; 50 L. J. (M. C.) 25; 45 L. T. N. S. 573.
(*g*) R. *v.* Long, 4 C. & P. 398.

that the death was caused or accelerated by such neglect; and medical evidence on behalf of the prosecution that the child's life probably might have been prolonged or saved by the parent calling in medical aid is not sufficient evidence to support a conviction.(*h*) With regard to negligence, there is a great difference between criminal and civil proceedings. The criminal law does not recognize the defense of contributory negligence in manslaughter.(*i*)

It is commonly said that in manslaughter there can be no accessories before the fact, because the act causing death is done without premeditation. But though this may be true is cases the gist of which is the sudden heat, it is easy to imagine cases in which this principle could not be maintained.(*k*)

Manslaughter is a felony, punishable by penal servitude to the extent of life—or in lieu of, or in addition to, the penal servitude or imprisonment, a fine may be imposed.(*l*) Cases of mere carelessness, etc., legally amounting to manslaughter, are often more appropriately punished by pecuniary fine than by the indignity of imprisonment.

[In many of the United States, murder is distinguished into two grades, the first and the second degree. In New York, there are degrees of manslaughter.

The statutes of Kentucky do not define murder or manslaughter, but make the punishment of "willful murder" death or confinement in the penitentiary for life, at the discretion of the jury, and of "voluntary manslaughter" confinement in the penitentiary for not less than two nor more than twenty-one years. Rev. Stat. (1877), 322.

In Ohio, "whoever purposely, and either of deliberate and premeditated malice, or by means of poison, or in perpetrating, or attempting to perpetrate, any rape, arson, robbery, or burglary, kills another, is guilty of murder in the first degree." It was held in Fouts *v.* State, 8 Ohio St. 98, and affirmed in subsequent cases, that the intent to kill is essential, and that an indictment for murder is bad on demurrer, which omits to charge such intent. These decisions were upon the definition in the act of 1831, and were criticised. The definition in the code of 1877, given

(*h*) R *v.* Morby, 8 Q. B. D. 571; 51 L. J. (M. C.) 85; 46 L. T. N. S. 238; 30 W. R. 13.

(*i*) R. *v.* Swindall, 2 C. & K. 230; R. *v.* Jones, 11 Cox, 544. For other classes of acts which amount to manslaughter, the reader is referred to the classification of events given below.

(*k*) v. R. *v.* Gaylor, cited above, p. 88.

(*l*) 24 and 25 Vict., c. 100, § 5.

above, by inserting the word "either," makes the statute explicit and prevents cavil.

Maliciously placing an obstruction on a railroad, or displacing or injuring any thing appertaining thereto, with intent to endanger the passage of any locomotive or car, and thereby occasioning death, is also murder in the first degree. Purposely and maliciously killing, except as provided in the above two sections, is murder in the second degree. Unlawfully killing, except as in the above three sections, is manslaughter. The punishment of murder in the first degree is death; in the second degree, is imprisonment in the penitentiary for life; and of manslaughter, is imprisonment in the penitentiary for not more than twenty years nor less than one year. 74 Ohio L. 244.

In Indiana: § 2. "If any person of sound mind shall purposely and with premeditated malice, or in the perpetration, or attempt to perpetrate, any rape, arson, robbery, or burglary, or by administering poison, or causing the same to be done, kill any human being, such person shall be deemed guilty of murder in the first degree." § 3. "If either party to a duel be killed, the survivor shall be deemed guilty of murder in the first degree." So, § 5. If, by previous appointment made within the state, any person shall fight a duel without the state, and therein inflict a mortal wound, whereof the injured person shall die within the state. § 7. To kill purposely and maliciously, but without premeditation, is murder in the second degree. § 8. To kill unlawfully, without malice express or implied, either voluntarily, upon a sudden heat, or involuntarily, but in the commission of some unlawful act, is manslaughter. The punishment of murder in the first degree is death or imprisonment in the penitentiary for life; of murder in the second degree, such imprisonment for life; of manslaughter, such imprisonment for not more than twenty-one nor less than two years. Rev. Stat. (1876), 423–426. In Indiana, intent to kill is not essential to constitute murder in the first degree. Stocking *v.* State, 7 Ind. 326.

In Illinois: "Murder is the unlawful killing of a human being, in the peace of the people, with malice aforethought,

either express or implied. Express malice is that deliberate intention unlawfully to take away the life of a fellow-creature, which is manifested by external circumstances capable of proof. Malice shall be implied when no considerable provocation appears, or when all the circumstances of the killing show an abandoned and malignant heart." Rev. Stats. (1877), § 140, p. 370. If the death of the mother results from an attempt to cause abortion or miscarriage, the person so attempting is guilty of murder. § 3, p. 349. If the life of any person be lost in consequence of an arson, the person guilty of such arson is guilty of murder. § 13, p. 351. Whoever willfully and maliciously obstructs or injures a railway or rolling-stock, or places a false signal-light thereon, with intent to obstruct the use of the road or injure persons or property passing thereon, by reason whereof any person is killed, the person so offending is guilty of murder. § 186, p. 376. Whoever, by willful and corrupt perjury, or subornation of perjury, procures the conviction and execution of any innocent person, is guilty of murder. § 226, p. 383. Manslaughter is the unlawful killing, without malice express or implied, and without any mixture of deliberation whatever. It must be voluntary, upon a sudden heat of passion, caused by a provocation apparently sufficient to make the passion irresistible, or involuntary, in the commission of an unlawful act, or a lawful act, without due caution or circumspection. § 143, p. 370. The punishment of murder is death or imprisonment in the penitentiary for life, or for a term not less than fourteen years; of manslaughter, such imprisonment for life or for any term of years, the punishment to be determined by the jury, if a trial—by the court, upon a plea of guilty. §§ 142, 146.

In Michigan, murder is not defined by statute; but all murder perpetrated by means of poison, or lying in wait, or any other kind of willful, deliberate, and premeditated killing, or committed in the perpetration or attempt to perpetrate any arson, rape, robbery, or burglary, is declared murder in the first degree; and all other kinds of murder, the second degree. Murder by reason of a duel is the same

as in Indiana. Manslaughter is not defined. The punish ment of murder in the first degree is solitary confinement at hard labor in the penitentiary for life; of murder in the second degree, imprisonment in penitentiary for life or such term of years as the court may determine; of manslaughter, imprisonment for not more than fifteen years, or fine not exceeding one thousand dollars or both. Rev. Stat. (1872), 2270–2272.

In Iowa, murder is killing any human being, with malice aforethought, either express or implied. The degrees are defined as in Michigan. Fighting a duel with deadly weapons, and inflicting a mortal wound on the antagonist, whereof death ensues, is murder in the first degree. Manslaughter is not defined. The punishment of murder in the first degree is imprisonment for life at hard labor in the penitentiary; in the second degree, imprisonment for life or for a term not less than ten years; of manslaughter, imprisonment for not more than eight years and fine not exceeding one thousand dollars.]

APPENDIX.

The importance of a clear apprehension of the state of the law as to what acts are murder, manslaughter, and non-felonious homicide respectively, makes it not impertinent to insert the following compilation of distinctions judicially laid down on the subject, made by Sir James Stephen (Gen. View of Crim. Law, 116):—

"The following states of mind have been specifically determined to be wicked or malicious in the degree necessary to constitute murder:

"(a.) An intent to kill whether directed against the person killed or not, or against any specific person or not.

"(b.) An intent to commit felony.

"(c.) An intent illegally to do great bodily harm.

"(d.) Wanton indifference to life in the performance of an act likely to cause death, whether lawful or not.

"(e.) A deliberate intent to fight with deadly weapons.

"(f.) An intent to resist a lawful apprehension by any person legally authorized to apprehend.

"The following states of mind have been determined to constitute that lighter degree of malice which is necessary to the crime of manslaughter:

"(a.) An intent to kill under the recent provocation, either of considerable personal violence inflicted on the prisoner by the deceased, or of the sight of the act of adultery committed by the deceased with the prisoner's wife.

"(b.) An intent to inflict bodily injury, not likely to cause death, under a slight provocation; as when a man striking a trespasser with a slight stick, kills him.

"(c.) A deliberate intent to fight in a manner not likely to cause death, or an intent to use a deadly weapon in a fight begun without the intention to use it.

"(d.) An intent to resist an unlawful apprehension, or an apprehension of the lawfulness of which the prisoner had no notice.

"(e.) An intent to apprehend, or otherwise to execute, legal process executed with unnecessary violence.

"(f.) Negligence in doing a lawful act, or an unlawful act not amounting to felony.

"The following states of mind have been held not to be malicious or wicked at all, and when any of them exist at the time when death is caused, no crime is committed:

"(a.) An intent to execute sentence of death.

"(b.) An intent to defend person, habitation, or property against one who manifestly intends, or endeavors by violence or surprise, to commit a known (*i. e.*, apparent) felony, such as rape, robbery, arson, burglary, etc.

"(c.) An intent lawfully to apprehend or keep in custody a felon who can not otherwise be apprehended or kept in custody, or to keep the peace if it can not otherwise be kept.

"(d.) Absence of all unlawful and malicious intents or states of mind. (This is the case of accident.)"

CHAPTER II.

RAPE, ETC.

RAPE.

THE offense of carnal knowledge of a woman by force against her will.

Certain persons can not be convicted of this crime. An infant under the age of fourteen is deemed in law to be incapable of committing this offense, on account of his presumed physical incapacity. And this is a presumption which can not be rebutted by evidence of capacity in the particular case.(1) Neither can a husband be guilty of a rape upon his wife. But both a husband and a boy under fourteen may be convicted as principals in the second degree, and may be punished for being present aiding and abetting.

To constitute the offense, the act must be committed by force, and without the consent of the female. If, however, she yielded through fear of death or duress, it is nevertheless rape; for here the consent is at most imperfect. So also when she submitted under a false representation, such as that she was about to undergo medical treatment, she being ignorant of the nature of the act.(*y*) But the crime is not committed when the woman has consented to the act of connection under the belief that the man was her husband. In that case, however, the man may be convicted of an assault.(*z*) It is equally rape though the female is a common prostitute or the concubine of the prisoner; but circumstances of this nature will probably operate with the jury in their consideration as to whether there was consent. It is necessary to prove penetration, but not any thing fur-

(1) This presumption can be rebutted in Ohio, by proof of actual puberty. Williams *v.* State, 14 Ohio, 222.

(*y*) R. *v.* Flattery, L. R. Q. B. 410; 46 L. J. (M. C.) 130.

(*z*) R. *v.* Barrow, L. R. 1 C. C. R. 156; 38 L. J. (M. C.) 20. It is doubtful whether, after the remarks of the judges in R. *v.* Flattery, R. *v.* Barrow would now be followed.

ther.(*t*)(1) If the prosecution fail to prove this, the prisoner may nevertheless be convicted of the attempt.

At almost every trial for this crime the words of Sir Matthew Hale are recalled: "It is an accusation easy to be made and hard to be proved, but harder to be defended by the party accused, though innocent." It will be well to estimate the decree of credibility of the testimony of the woman, for of course she is a competent witness. On this point we can not do better than remember the words of Blackstone.(*u*) The credibility of her testimony, and how far she is to be believed, must be left to the jury upon the circumstances of fact that concur in that testimony. For instance, if the witness be of good fame; if she presently discovered the offense and made search for the offender; if the party accused fled for it; these and the like are concurring circumstances, which give greater probability to her evidence. But, on the other side, if she be of evil fame, and stand unsupported by the testimony of others; if she concealed the injury for any considerable time after she had opportunity to complain; if the place where the fact was alleged to have been committed was where it was possible she might have been heard, and she made no outcry; these and the like circumstances carry a strong, but not conclusive, presumption that her testimony is false or feigned. The prisoner may call evidence to her generally bad character for want of chastity or indecency, and of her having had connection with him previously, but not of her having had connection with others. As to the last point she may be asked the question, but is not compelled to answer it; if she denies it, the person referred to can not be called to contradict her.(*x*)

The punishment for this crime, which is a felony, is penal servitude to the extent of life.(*y*)

(*t*) 24 and 25 Vict., c. 100, § 63. (*u*) 4 Bl. 213.

(*x*) R. *v.* Holmes, L. R., 1 C. C. R. 334; 41 L. J. (M. C.) 12.

(*y*) 24 and 25 Vict., c. 100, § 48.

(1) It was otherwise before the statute. Penetration is made sufficient by statute in Indiana, Rev. Stat. 1876, p. 430; Illinois, Rev. Stat. 1877, p. 384; Michigan, Rev. Stat. 1871, p. 2073; and Iowa, Rev. Stat. 1873, p. 9; 74 Ohio L. 349.

CARNALLY ABUSING CHILDREN.

To unlawfully and carnally know and abuse any girl, if she is under the age of twelve years, is a felony, punishable by penal servitude to the extent of life; if between twelve and thirteen, whether with or without the consent of the girl, it is a misdemeanor, punishable by imprisonment not exceeding two years.(*z*)

In this offense it is immaterial whether the act were done with or without the consent of the child. She may be a witness on her oath if she appears sufficiently to understand the nature and obligation of an oath.

Another offense may be noticed here: By false pretenses, false representations, or other fraudulent means, to procure any female under the age of twenty-one years to have illicit carnal connection with any man is a misdemeanor, punishable by imprisonment not exceeding two years.(*a*)

To commit an indecent assault upon a female, or to attempt to have carnal knowledge of a girl under twelve years of age, is a misdemeanor, punishable by penal servitude not exceeding two years.(*b*)

UNNATURAL CRIMES.

To commit the crime against nature, with mankind or with any animal, is a felony, punishable by penal servitude; the penal servitude may extend to life, but may not be less than ten years.(*c*) The evidence is the same as in rape, with two exceptions: (a) It is not necessary to prove the offense to have been committed without the consent of the person upon whom it was perpetrated. (b) Both parties, if consenting, are equally guilty; but if one of the parties is a boy under the age of fourteen years, it is felony in the other only. [There is no such crime in Ohio,(1) Indiana, or Iowa.(2)]

To attempt to commit the said crime, or to make an assault with intent to commit the same, or to make an inde-

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(*z*) 38 and 39 Vict., c. 94.
(*a*) 24 and 25 Vict., c. 100, § 49.
(*b*) Ibid., § 52.
(*c*) Ibid., § 61.
(1) Davis *v.* Brown, 27 Ohio St. 325.
(2) Estes *v.* Carter, 10 Iowa. 400.

cent assault upon a male person, is a misdemeanor, punishable by penal servitude to the extent of ten years.(*d*)

ATTEMPTS TO PROCURE ABORTION.

Three classes of persons may be guilty of crimes under this heading. The woman herself—the person who procures or supplies the drug, etc.—some other person.

For a woman being with child, with intent to procure her own miscarriage, to administer to herself any poison or other noxious drug, or to use any instrument or other means; or,

For any person to do the same with intent to procure the miscarriage of any woman, whether she be with child or not, is a felony, punishable by penal servitude to the extent of life.(*e*) It is not necessary that the drug administered should have any tendency to produce miscarriage; it is enough if it is "noxious" and is given with the intent charged, if it is in itself hurtful.(*f*)

For any person to procure or supply poison or other noxious thing, or any instrument or thing, knowing that the same is intended to be unlawfully used with intent to procure the miscarriage of a woman, is a misdemeanor, punishable by penal servitude to the extent of five years.(*g*)

(*d*) 24 and 25 Vict., c. 100, § 62. As to obtaining money by threatening to accuse of this crime, v. p. 104.

(*e*) Ibid., § 58.

(*f*) R. v. Cramp, 14 Cox, 390.

(*g*) 24 and 25 Vict., c. 100, § 59.

CHAPTER III.

ASSAULTS, ETC.

UNDER this head we shall consider all the remaining offenses against the person.

COMMON ASSAULT.

An *assault* is an attempt or offer to commit a forcible crime against the person of another; for example, presenting a loaded gun at a person. It will be noticed that there need not be an actual touching of the person assaulted. But mere words never amount to an assault. (*t*)

The combatants at a prize fight and all persons aiding and abetting therein are guilty of an assault for which an indictment will lie. But (Lord Coleridge, C. J., Pollock, B., and Matthew, J., dissenting) the mere voluntary presence of persons at a prize fight does not necessarily make them guilty of an assault, as aiding and abetting. (*u*)

The unlimited character of this crime makes it a convenient means of punishing a variety of crimes, which do not at first sight seem to be assaults, at least not in the popular signification of the term; for example, putting a child into a bag, hanging it on some palings, and there leaving it. (*v*)

A *battery* is not necessarily a forcible striking with the hand or stick or the like, but includes every touching or laying hold (however trifling) of another person, or his clothes, in an angry, revengeful, rude, insolent, or hostile manner; for example, jostling another out of the way. Thus, if a man strikes at another with a cane or fist, or throws a bottle at him, if he miss, it is an *assault*; if he hit, it is a *battery*.

As a rule, consent on the part of the complainant deprives the act of the character of an assault, unless, indeed, non-resistance has been brought about by fraud. But the fact of consent will in

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(*t*) 1 Hawk., c. 62, § 1.

(*u*) R. v. Coney, 8 Q. B. D. 534; 51 L. J. (M. C.) 66; 46 L. T. N. S. 307; 30 W. R. 678.

(*v*) R. v. March, 1 C. & K. 496.

general be immaterial when an actual battery or breach of the peace has been committed.(*w*)

A common assault is also the subject of a civil action for damages; and the party injured may either prosecute or bring his action first. The court will not, however, pass judgment during the pendency of a civil action for the same assault,(*y*) the reason obviously being that otherwise the issue of the civil action might be prejudiced.

A common assault, that is, a mere assault which may or may not have proceeded to a battery, is a misdemeanor, punishable by imprisonment not exceeding one year.(*z*) But the justice of the case is often more adequately met by compensation to the person injured. Therefore, with the assent of the prosecution, if the circumstances appear to warrant that course, the court may allow the defendant to plead guilty, and inflict upon him a merely nominal fine, on the understanding that he shall make a compensation to the prosecutor.(*a*)

Common assaults are usually disposed of by the magistrates assembled at petty sessions. The limit of punishment in ordinary cases of such summary conviction is a fine of £5 or imprisonment not exceeding two months; but in some more serious cases of assault upon females or boys whose age does not exceed fourteen years, the limits are £20 and six months.(*b*)

When a husband is convicted summarily or otherwise of an aggravated assault upon his wife, the court or magistrate, if satisfied that the future safety of the wife is in peril, has power to make an order having the effect of a judicial separation; and may also order the husband to pay a weekly sum for the support of the wife, and to give the custody of children under the age of ten years to the wife. The orders for alimentary payments and for custody of the children are revocable in case of adultery of the wife. And all orders under these powers are subject to appeal to the Probate and Admiralty Division of the High Court of Justice.(*c*)

The magistrates have not power to hear and determine any assault involving a question of title to lands, tenements, or hereditaments, or any interest therein or accruing therefrom, or as to any bankruptcy of insolvency, or any execution under the process of any court of justice. And if the assault is accompanied by an at-

(*w*) Broom, 917.
(*z*) 24 and 25 Vict., c. 100, § 47.
(*b*) 24 and 25 Vict., c. 100, §§ 42, 43.
(*c*) 41 and 42 Vict., c. 19.
(*y*) R. *v.* Mahon, 4 A. & E. 575.
(*a*) R. *v.* Roxburgh, 12 Cox, 8.

tempt to commit a felony, or, in the opinion of the magistrates, is a fit subject for prosecution by indictment, they may abstain from any adjudication and leave the case to be prosecuted by indictment.(*d*)

As to the evidence on the part of the accused, it may be stated generally that the same facts which would reduce a homicide to misadventure are a good defense upon an indictment for a battery.(*e*) Other defenses are, that it was committed merely in self-defense, or in the proper administration of moderate correction, or in the execution of public justice, or in some lawful game. Inasmuch as it would not be right that the defendant should be punished twice for the same offense, it is a good defense that the matter has been disposed of by two justices: provided that if the defendant has been convicted, he has paid the penalty and suffered the imprisonment awarded; if dismissed, it does not matter whether it was on the ground of justification, the trifling character of the offense, or because it was not proved.(*f*)

So much for *common* assaults; we have now to deal with those of an aggravated character.

ACTUAL AND GRIEVOUS BODILY HARM.

If the assault occasions *actual bodily harm*, the punishment is penal servitude to the extent of five years (*g*) for the misdemeanor. Actual bodily harm would include any hurt or injury calculated to interfere with the health or comfort of the prosecutor; it need not be an injury of a permanent character.(*h*) Nor is it necessary that there should be an intention to injure particular persons. Thus, where the prisoner shortly before the conclusion of a performance at a theater, with the intention and with the result of causing terror in the minds of persons leaving the theater, put out the gas lights on a staircase which a large number of such persons had to descend in order to leave the theater, and also placed an iron bar across a doorway through which they had in leaving to pass, and thereupon a panic seized a large portion of the audience, and they rushed in fright down the staircase, forcing those in front across the iron bar, and thus several of the audience were thrown down or otherwise severely injured, it was held that the prisoner was

(*d*) 24 and 25 Vict., c. 100, § 46.
(*e*) Arch. 695.
(*f*) 24 and 25 Vict., c. 100, §§ 44, 45.
(*g*) Ibid., § 47.
(*h*) Arch. 694.

rightly convicted of unlawfully and maliciously inflicting grievous bodily harm.(*i*)

Unlawfully and maliciously *wounding* or inflicting any *grievous bodily harm* upon any other person, with or without any weapon or instrument, is a misdemeanor, punishable by penal servitude to the extent of five years.(*k*) If any person (a) wound (b), cause grievous bodily harm (c), shoot at, or (d) attempt to shoot at any other person, with intent to (a) maim (b), disfigure, or (c) disable any person, or (d) to do some other grievous bodily harm to him, or (e) to resist or prevent the lawful apprehension of any one, he is guilty of a felony, punishable by penal servitude to the extent of life.(*l*)

To constitute a *wounding*, the continuity of the skin must be broken. The nature of the instrument is immaterial, whether it be a stab by a knife, a kick, or a gunshot wound, etc.(*m*)

To *maim* is to injure any part of a man's body, which may render him less capable of fighting. The injury is termed *mayhem*.

The term "*disfigure*" explains itself. To *disable*, refers to the causing of a permanent, and not merely a temporary disablement.(*n*)

The *grievous bodily harm* need not be either permanent or dangerous, so long as it seriously interferes with health or comfort.(*o*)

The intent can of course only be proved by presumptive evidence gathered from the facts of the case. The intent need not be to maim, etc., the particular person who is injured; thus, if a person intending to inflict grievous bodily harm on A., wounds B., he is guilty of wounding with intent, etc.(*p*)

ASSAULT WITH INTENT TO COMMIT A FELONY.

This crime is a misdemeanor, punishable with imprisonment not exceeding two years. If the intent can not be proved, the defendant may be convicted of a common assault.(*q*)

ADMINISTERING POISON, ETC.

To administer, etc., any poison, or other destructive or noxious thing, so as thereby to endanger life or to inflict grievous bodily

(*i*) R. *v.* Martin, L. R. 8 Q. B. D. 54; 51 L. J. (M. C.) 36; 45 L. T. N. S. 444; 30 W. R. 106.

(*k*) 24 and 25 Vict., c. 100, § 20. (*l*) Ibid., § 18.

(*m*) R. *v.* Wood, 1 Mood. C. C. 278; R. *v.* Briggs, Ibid., 318.

(*n*) R. *v.* Boyce, 1 Mood. C. C. 29. (*o*) v. R. *v.* Ashman, 1 F. & F. 88.

(*p*) R. *v.* Stopford, 11 Cox, 643. (*q*) 24 and 25 Vict., c. 100, § 38.

harm, is a felony, punishable by penal servitude to the extent of ten years.(*r*) If the administering, though it does not so endanger life or inflict harm, is with intent to injure, aggrieve, or annoy the person, the offense is a misdemeanor, punishable by penal servitude to the extent of five years.(*s*) A person indicted for the first offense may be found guilty of the second.(*t*)

EXPLOSIVE OR CORROSIVE SUBSTANCES.

By explosion of gunpowder or other explosive substance, to burn, maim, disfigure, disable, or do and grievous bodily harm to any person, is a felony, punishable by penal servitude to the extent of life.(*u*) The same punishment is awarded for causing any gunpowder, or other explosive substance, to explode, or sending or delivering to, or causing to be taken or received by, any person, any explosive or other dangerous or noxious thing, or putting or laying at any place, or throwing at or upon, or otherwise applying to any person any corrosive fluid or any destructive or explosive substance, with *intent* to burn, maim, disfigure, or disable, or do any grievous bodily harm to any person, and this whether any bodily injury be effected or not.(*v*) If the gunpowder or other explosive substance is placed in, thrown in, into, upon, against, or near any building, ship, or vessel, with intent to do any bodily injury to any person, whether such purpose be effected or not, the offender is guilty of a felony, punishable by penal servitude to the extent of fourteen years.(*w*)

ENDANGERING SAFETY OF RAILWAY PASSENGERS.

The following acts are felonious, punishable by penal servitude to the extent of life:

To put or throw upon or across any railway any wood, stone, or other thing; (ii.) to take up, remove, or displace any rail, sleeper, or other thing belonging to a railway; (iii.) to move or divert any points or other machinery belonging to any railway; (iv.) to make, or show, hide, or remove any signal or light upon or near to any railway; (v.) to do or cause any other thing to be done with intent to endanger the safety of passengers;(*x*) or (vi.) to throw against or into any railway engine, carriage, or truck, any wood, stone, or

(*r*) 24 and 25 Vict., c. 100, § 23.
(*s*) Ibid., § 24.
(*t*) Ibid., 25.
(*u*) Ibid., § 28.
(*v*) Ibid, § 29.
(*w*) Ibid., § 30.
(*x*) Ibid., § 32.

other thing, with intent to injure or endanger the safety of any person in the train.(*y*)

It is a misdemeanor, punishable with imprisonment not exceeding two years, by any unlawful act, or by any willful omission or neglect, to endanger the safety of any person conveyed or being in or upon a railway, or to aid or assist therein.(*a*)

As to injuries from furious driving, v. p. 120.

ASSAULTS, ETC., CONNECTED WITH WRECKS.

To impede any person endeavoring to escape from a wreck or vessel in distress, or endeavoring to save another, is a felony, punishable by penal servitude to the extent of life.(*b*)

ASSAULTS ON OFFICERS.

To assault, resist, or willfully obstruct any peace officer in the due execution of his duty, or any person acting in aid of such officer, or to assault any person with intent to resist or prevent the lawful apprehension of oneself or of any other person for any offense, is a misdemeanor, punishable by imprisonment not exceeding two years.(*c*)

ASSAULTS ON THOSE IN A DEFENSELESS POSITION.

Apprentices or servants.—Whosoever, being legally liable, either as master or mistress, to provide for any apprentice or servant necessary food, clothing, or lodging, willfully and without lawful excuse refuses or neglects to do so, or (b) unlawfully or maliciously does, or causes to be done, any bodily harm, so that the life of the apprentice or servant is likely to be permanently injured, is guilty of a misdemeanor, and is punishable by penal servitude to the extent of five years.(*d*)

Lunatics.—Abusing, ill-treating, or willfully neglecting a patient in a private asylum, by any person employed therein, or any single patient by any one having charge of, or attending upon, such lunatic, is a misdemeanor, or punishable, on summary conviction, by forfeiture not exceeding £20.(*e*) So, also, is the striking, wounding, ill-treating, or willful neglect of any lunatic confined in a county or

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(*y*) 24 and 25 Vict., c. 100, § 33. (*a*) Ibid., § 34.

(*b*) Ibid., § 17.

(*c*) 24 and 25 Vict., c. 100, § 38. v. also 34 and 35 Vict., c. 112, § 12. For assaulting, etc., officers of the custom, v. p. 105.

(*d*) 24 and 25 Vict., c. 100, § 26. (*e*) 16 and 17 Vict., c. 96, § 9.

public asylum by any person employed therein.(*m*) A similar provision is made with regard to persons confined in asylums for criminal lunatics.(*n*)

FALSE IMPRISONMENT.

False imprisonment is a misdemeanor at common law, punishable by fine or imprisonment, or both. All that the prosecutor has to prove is the imprisonment; it is for the defendant to justify what he did.(*o*) A count for a common assault is usually added.

Every confinement or restraint of the liberty of a person is an imprisonment; for example, by detaining a man in the streets. Though a party, on being shown a magistrate's warrant, goes willingly, at the desire of a constable, this is an imprisonment which the constable may be called upon to justify.(*p*)

We have seen, under the title "Arrest," in what cases one person is justified in detaining another.(*q*)

(*m*) 16 and 17 Vict., c. 97, § 123.

(*n*) 23 and 24 Vict., c. 75, § 13. (*o*) Arch. 728.

(*p*) Chinn *v.* Morris, 2 C. & P. 361.

(*q*) As to indecent assault, v. p. 149; assaults in violation of trade v. p. 108.

PART III.

OFFENSES AGAINST INDIVIDUALS—THEIR PROPERTY.

CHAPTER I.

LARCENY.

LARCENY or theft may be defined as "the willfully wrongful taking *possession* of the goods of another with intent to deprive the owner of his *property* in them."(*r*)

Larceny is either simple or compound. Compound, or as it is termed "mixed" or "complicated" larceny, differs from simple larceny merely in that the former is accompanied with circumstances of aggravation. We shall defer the consideration of these aggravated cases until the simple crime has been dealt with.

The existing statute law on the subject of larceny and kindred offenses is contained in one of the criminal consolidation acts, 1861.(*s*)

(*r*) Rosc. 622; Fitz. St. 126. This definition, taken from Roscoe's Evidence in Criminal Cases, with a modification suggested by Sir James Stephen, may not, at first sight, appear to indicate all the elements of larceny. An ordinary definition is something of this sort: "A taking and carrying away of the personal goods of another of any value, against the will or without the consent of the owner, without any *bona fide* claim of right, with a felonious intent."—Arch. Quarter Sessions. But the definition in the text, besides avoiding certain defects, contains all the essentials set out in the second definition. Thus "without any claim of right by the taker" is included in the part relating to the intent; "against the will of the owner" in "wrongful;" "carrying away" in "taking possession."

(*s*) 24 and 25 Vict., c. 96. In the present chapter, the quotation merely of a section must be understood to refer to that act.

To understand the definition we have given, and to be prepared to distinguish the offenses of larceny, embezzlement, and obtaining by false pretenses, the line between which is finely drawn, it will be necessary to inquire what is signified by "possession," what by "property."

Possession extends not only to those things of which we have manual prehension, but those which are in our house, on our land, or in the possession of those under our control, as our servants, children, etc.(*t*) *Property*, in the sense of the definition, is "the right to the possession, coupled with an ability to exercise that right."(*u*)

To explain the nature of the crime it will be convenient to consider separately the component parts of the definition under the following heads:

i. What kinds of property may be the subjects of larceny.

ii. What constitutes a willfully wrongful taking possession of another's goods.

iii. What must be the intent.

i. The subjects of larceny.

Though it may be said that there is not any tenable ground for making some kinds of property incapable of being the subjects of larceny, for a long time there were many of such serious exceptions. Some still continue, while, in other cases, the stealing is dealt with in an exceptional way.(*x*) The goods must, in the absence of any express statutory enactment, be *personal* goods. This is the only kind of property which can be the subject of larceny at common law. As to other kinds:

(a.) The first and chief example of the common-law exclusion is—Things *real*, as lands and houses; and things attached or *belonging to the realty*, as trees, grass, the stones

(*t*) Rosc. 622; v. R. *v.* Reed, 23 L. J. (M. C.) 25. (*u*) Rosc. 622

(*x*) "There can be no good reason why stéaling a dog, worth perhaps many pounds, and regarded by his owner with strong personal regard, should be less criminal than stealing the dog's collar, worth perhaps half a crown, and regarded with no feeling whatever."—Fitz. St. 138. Yet we shall find that the treatment of the two cases is quite different, and the punishment disproportionate.

or lead of a house; also *title deeds* and other writings relating to real estate, inasmuch as they savor of the realty, and pass like real property to the heir or devisee. If the rights of the owner of such property are violated, he must seek a remedy in a civil action of trespass. He can not, as a rule (see exception below), appeal to the criminal law for the punishment of the offender. But if the things are severed from the land, etc., *e. g.*, mown grass, and then feloniously taken away, these may be made the subjects of an indictment for larceny, inasmuch as by the severance they have become personal goods. However, to give them this quality, an interval must have elapsed between the severance and the removal, so that the acts be perfectly distinct. And, in this interval, the wrong-doer must have intended to have abandoned the wrongful possession begun at the time of the severance; for example, it will not be larceny to sever and then conceal, till one can conveniently return and carry away, however long the interval may be, for the whole is regarded as one continuous act.(*y*)

The following are the statutory modifications of the rule excluding this class of property:(*z*)

a. Materials of buildings, fixtures, etc.—To steal or to rip, cut, sever, or break, with intent to steal, any glass or woodwork belonging to any building whatsoever; or any lead, iron, copper, brass, or other metal; or any utensil or fixture respectively fixed in or to any building whatsoever; or any thing made of metal or fixed in any land, being private property, or in any square or street, or in any place

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(*y*) R. *v.* Townley, L. R., 1 C. C. R. 315; 40 L. S. (M. J.) 144.

(*z*) "The law, as now regulated by 24 and 25 Vict., c. 96, excepts from the rule that real property can not be the subject of larceny, every sort of real property likely to be stolen, such as fixtures, trees, fences, vegetable productions, and minerals"—but still land itself continues to be incapable of being stolen, though for no valid reason. "Suppose that a man unlawfully, and with intent to defraud, builds a wall in such a manner as to inclose a strip of land to which he knows he has no right, why should he not be indicted for stealing the land?" —Fitz. St. 55, 132.

dedicated to the public use or ornament, in any burial-ground, is punishable as simple larceny.(*a*)

b. Mines, etc.—To steal, or sever with intent to steal, the ore of any metal, or any manganese, black lead, etc., or any coal, from any mine, bed, or vein, is a felony, punishable by imprisonment not exceeding two years.(*b*)

The same consequences attend frauds of a similar nature by any one employed about the mine.(*c*)

c. Trees.—To steal or destroy, or damage with intent to steal, any tree, sapling, shrub, or underwood growing in a park, pleasure-ground, garden, orchard, or avenue, or in any ground adjoining or belonging to a dwelling-house, if the injury amounts to the value of £1; or, if growing elsewhere, to the value of £5, is a felony, punishable as simple larceny.(*d*) If the injury is to the value of 1*s.*, wherever the tree, etc., may be growing, the case may be dealt with summarily, and punished, for the first offense, by fine not exceeding £5 above the injury done; for the second, imprisonment not exceeding twelve months; on a third conviction, the offense is a felony, punishable as simple larceny.(*e*)

d. Plants, etc.—To steal or destroy, or damage with intent to steal, any plant, root, fruit, or vegetable production growing in any garden, orchard, hot-house, etc., is punishable, on summary conviction, by punishment not exceeding six months, or fine not exceeding £20. The second offense is punishable as simple larceny.(*f*)

e. Deeds, etc.—To steal, or for any fraudulent purpose to destroy, cancel, obliterate, or conceal any or part of any documents of title to lands, is punishable by penal servitude to the extent of five years.(*h*)

(b.) A second exclusion by the common law is of *choses in*

(*a*) § 31. (*b*) § 38. (*c*) § 39.
(*d*) § 32. (*e*) § 33. (*f*) § 36.
(*h*) § 28. As to concealment of instruments of title, or falsification of pedigree by vendor or mortgagor, or his solicitor or agent, v. 22 and 23 Vict., c. 35, § 24.

action (*i. e.*, mere rights to demand, by action or other proceedings, property; or evidence of such rights).

But, without delaying at the common-law view of the matter, it may be stated that the statutory exceptions to it include "every chose of action that has ever been known to be stolen, or which occurred to the mind of the draughtsman as capable of being stolen."(*i*) Thus, to steal, or for any fraudulent purpose to destroy, cancel, or obliterate the whole or any part of any *valuable security*, other than a document of title to lands, is a felony, of the same nature and degree, and punishable in the same manner, as if the offender had stolen any chattel of like value with the sum represented by the security.(*k*) The term "valuable security" is declared to include any order, exchequer, admittance, or other security whatsoever, entitling or evidencing the title of any person or body corporate to any share or interest in any public stock or fund, whether of the United Kingdom, or of Great Britain, or of Ireland, or of any foreign state, or in any fund of any body corporate, company, or society, whether within the United Kingdom or in any foreign state or country, or to any deposit in any bank; and also any debenture, deed, bond, bill, note, warrant, order, or other security whatsoever, for money, or for payment of money, whether of the United Kingdom, or of Great Britain, or of Ireland, or of any foreign state; and any document of title to (lands v. *supra*) goods.(*l*) Of course, under these terms will be included all ordinary checks, promissory notes, money orders, etc.

Notwithstanding the comprehensiveness of this provision, it will be better in some cases to describe the property stolen as so much paper, etc.; for example, if only half a note is stolen.(*m*)

It will be convenient to notice here the other exceptional cases of stealing written instruments.

Wills.—To steal, or for any fraudulent purpose destroy, cancel, obliterate, or conceal, either during the life or after the death of the testator, any will, codicil, or other testamentary instrument, whether of real or personal property, is a felony, punishable by penal servitude to the extent of life. The criminal proceeding does not affect the civil remedy; and no person is liable to be convicted if, before he is charged with the offense, he has first disclosed such act on oath in consequence of the compulsory process of a court of

(*i*) Fitz. St. 55. (*k*) § 27. (*l*) § 1.
(*m*) R. *v.* Mead, 4 C. & P. 535.

law or equity, or in compulsory examination or deposition in bankruptcy or insolvency.(*n*)

Records.—To steal, or for any fraudulent purpose to remove, injure, obliterate, etc., records, or other documents belonging or relating to a court of record or equity, or of a public office, is a felony punishable by penal servitude to the extent of five years.(*o*)

(c.) A third exclusion of the common law is of *things which are not the subjects of property at all.*

The chief example of this is in the case of certain animals. But, in addition to these, in certain other things there is no property, as a corpse. So it was said of treasure trove, waifs, etc.(*p*) Nor can water in pipes be the subject of larceny.(*q*)

Animals—At common law there can be no larceny of animals in which there is no property. Such are beasts that are *ferœ naturæ* and unreclaimed, *e. g.*, deer, hares, or conies in a forest, chase, or warren; fish in an open river or pond; or wild fowls, rooks for instance, at their natural liberty; and this notwithstanding that the right to take the animals in the particular place is enjoyed exclusively by one or more persons. Thus it is not larceny to shoot and take a hare on B.'s land; the offense will be one against the game laws. On the other hand, dead animals, whether to be used for food or not, may be the subjects of larceny. But here, with regard to shooting and taking by the same person, the rule noticed above as to a break in the proceedings by abandoning possession must be observed.(*r*)

Again, if the animals are evidently reclaimed, or are practically under the care and dominion of any person, and may serve for food, they may be the subjects of larceny. So, also, may be valuable domestic animals, as horses; and all animals *domitæ naturæ* which serve for food, as swine, poultry, and the like; and the product of any of them, as eggs, milk, wool, etc. But other animals which do not serve for food are not the subjects of larceny, *e. g.*, dogs, bears, foxes, etc., though they may be recovered in a civil action.

Such is the common law; it has thus been modified by statute:

a. Deer.—To unlawfully and willfully course, hunt, snare, or carry away, or kill or wound, or attempt to kill or wound, any deer kept in an uninclosed part of a forest, chase, or purlieu, is punish-

(*n*) § 29. This provision as to non-liability refers also to the case of documents of title to lands, v. p. 202.

(*o*) § 30. (*p*) But v. 68.

(*q*) Fereus *v.* O'Brien, 11 Q. B. D. 21; 52 L. J. (M. C.) 70; 31 W. R. 648.

(*r*) v. p. 160, R. *v.* Townley.

able, on summary conviction, by penalty not exceeding £50. The second offense is a felony, punishable by imprisonment not exceeding two years.(*s*) If the deed is done in an inclosed place, the first or any offense is a felony, punishable by imprisonment not exceeding two years.(*t*) To have in possession, without satisfactorily accounting for the same, any deer, or the head, skin, or other part thereof, or a snare or engine for taking deer,(*u*) or (b) to set or use any such snare, or destroy any part of the fence of any land where any deer are kept,(*v*) is punishable on summary conviction.

b. Hares, etc.—To unlawfully and willfully, between the expiration of the first hour after sunset and the beginning of the last hour before sunrise, take or kill any hare or rabbit in a warren or ground (whether inclosed or not) lawfully used for the breeding or keeping of hares or rabbits, is a misdemeanor. To do the above at any other time, or at any time to set a snare, is punishable, on summary conviction, by a penalty not exceeding £5.(*w*)

c. Fish, etc.—To unlawfully and willfully take or destroy any fish in any water adjoining or belonging to the dwelling-house of the owner of such water is a misdemeanor; in water not so situated, but which is private property, or in which there is any private right of fishery, is punishable, on summary conviction, by a penalty not exceeding £5 above the value of the fish.(*x*)

To steal any oysters, or oyster brood, layer, or fishery, being the property of any other person, and sufficiently marked out, or known as such, is a felony, punishable as in the case of simple larceny. To use any net, instrument, etc., for taking oysters, or to drag upon the ground of such fishery, is a misdemeanor, punishable by imprisonment not exceeding three months.(*y*)

d. Dogs.—Stealing a dog is punishable, on summary conviction, by imprisonment not exceeding six months, or with a penalty not exceeding £20 above the value of the dog. A second offense is a misdemeanor, punishable by imprisonment not exceeding eighteen months.(*z*) The same consequences, without the alternative of imprisonment for the first offense, attend the unlawful having possession of a stolen dog or its skin, knowing it to have been stolen.(*a*) To corruptly take money for aiding any person to recover a dog stolen, or in the possession of any person not the owner thereof, is a misdemeanor, punishable by imprisonment not exceeding eighteen months.(*b*)

(*s*) § 12. (*t*) § 13. (*u*) § 14. (*v*) § 15. (*w*) § 17. (*x*) § 24.
(*y*) § 16; see also 31 and 32 Vict., c. 45, pt. 3, §§ 28, 42, 43, 51, 52, 55.
(*z*) § 18. (*a*) § 19; see also § 22. (*b*) § 20.

e. Horses, cows, sheep, etc.—One reason for increasing the severity of the punishment is the ease with which the crime can be committed, so that the deterrent effect of the consequences may be proportioned to the inducements to commit it. On this account the punishment imposed by statute for stealing any of these animals exceeds that for simple larceny at common law.

To steal a horse, mare, gelding, colt, filly; bull, cow, ox, heifer, calf; ram, ewe, sheep, or lamb, is a felony, punishable by penal servitude to the extent of fourteen years.(*d*) To willfully kill any animal, with intent to steal the carcase, skin, or any part, is a felony, punishable as if the offender had been convicted of feloniously stealing the same, provided the offense of stealing the animal so killed would have been felony.(*e*)

[In Ohio, it is larceny to steal "any thing of value,"(1) and the phrase "any thing of value" includes every thing that has heretofore been made subject to larceny, including things which savor of realty, though there be no interval of time between the severing and the taking away, "and every thing of any value whatever."(2) In Illinois, larceny "embraces every theft which deprives another of his money or other personal property, or those means and muniments by which the right or title to property, real or personal, may be ascertained—and any bond, bill, note, receipt, or any instrument of writing of value to the owner."(3) The statutes of the states generally state, with great detail, the choses in action, and the other writings, that are made subjects of larceny, and make horse-stealing a special and aggravated offense.]

Further, with regard to the goods: As a rule, the *value* of the thing stolen is no longer of any moment in larceny. Except, indeed, where some amount is specially mentioned in the statute as of the essence of the crime, for example, in the case of trees;(*f*) or where the value of the thing

(*d*) § 10.
(*e*) § 11.
(*f*) §§ 32, 33; v. *supra*.
(1) 74 Ohio L. 252.
(2) 74 Ohio L. 241.
(3) Rev. Stat., 1877, p. 373.

determines whether the case may be dealt with in a summary way.(*g*) And, of course, if it appear at the trial that the theft was of considerable extent, this will be one element which will make the offense more serious, and will therefore influence the court in its judgment. But now, in ordinary cases, no statement of value or price is necessary in the indictment.(*h*) Formerly it was otherwise. There was a division into *grand* and *petty* larceny: the former comprising cases of larceny of goods of the value of twelve pence and upward; such offenses being attended with more serious punishment than petty larcenies, which comprised cases of theft where the value did not reach that sum. But now the distinction is abolished, and every simple larceny is of the same nature and subject to the same incidents as grand larceny was formerly.(*i*) Though to make a thing the subject of an indictment for larceny it must be of *some* value, and stated to be so in the indictment, yet it need not be of the value of some coin known to the law, that is to say, of a farthing at the least.(*k*)

[In Ohio, grand larceny is the stealing of the value of thirty-five dollars or more; petit larceny, less than that sum. 74 Ohio L. 252. In Kentucky, if the value stolen is four dollars, or more, it is grand, otherwise, it is petty larceny. Rev. Stat. 1877, p. 333. In Indiana, if the value stolen is five dollars or upward, it is grand, otherwise, it is petty larceny. Rev. Stat. 1876, p. 432. In Illinois, the distinction is between value exceeding, and value not exceeding, fifteen dollars. Rev. Stat. 1877, p. 373. In Michigan, the distinction is between value exceeding, and value not exceeding, twenty-five dollars. Rev. Stat. 1871, pp. 2081, 2082. In Iowa, it is exceeding, or not exceeding, twenty dollars.

Grand larceny is a felony; petty larceny a misdemeanor. But in Michigan the punishment for grand larceny is imprisonment in the penitentiary not more than five years,

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(*g*) v. 18 and 19 Vict., c. 126, § 1. (*h*) 14 and 15 Vict., c. 100, § 24.
(*i*) 7 and 8 Geo. 4, c. 29, § 2, re-enacted by 24 and 25 Vict., c. 96, § 2
(*k*) R. *v.* Morris, 9 C. & P. 349.

or fine not exceeding five hundred dollars, and imprisonment in the county jail not more than one year.]

As to the description of the *ownership* of the goods.—The name of the owner must be given in the indictment, unless it be one of those cases in which the statute expressly declares this to be unnecessary, *e. g.*, of wills.(*l*) In other than these exceptional cases it must be proved that the goods stolen are the absolute or special property of the person named in the indictment.(*m*) [If goods are stolen from the possession of the owner, the ownership must be laid to him; if from any other person who has possession of them, the ownership may be laid in the actual owner or in the person from whom they were taken.(1) If goods are stolen from a thief who had previously stolen them, ownership may be laid either in such thief or in the owner.(2)]

ii. *The willfully wrongful taking possession.*

The object of inserting "willfully" before the "wrongful taking" is to distinguish the wrongful taking which constitutes larceny from the wrongful taking which merely affords ground for a civil action. Thus a person, imagining that he has the right, taking the goods of another under an illegal distress, is liable to civil but not to criminal proceedings. In any case, if the taking is under color of right, though the supposed right be without foundation, there is no larceny.(*n*)

The taking is either actual or constructive—*Actual*, when the thief directly takes the goods out of the possession of the owner or his bailee, *invito domino*,(*o*) by force or by stealth, or the like: *Constructive*, when the owner delivers the goods, but either does not thereby divest himself

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(*l*) § 29.

(*m*) As to the person in whom the ownership must be laid, v. p. 263.

(*n*) v. p. 174.

(*o*) A slight apparent exception to the rule that the taking must be *invito domino*, occurs in the case of the owner receiving intimation of the proposed theft, and resolving to allow it to be carried out in order to convict the thief. R. *v.* Eggington, 2 Leach, 913.

(1) Huling *v.* State, 17 Ohio St. 583.

(2) Stanley *v.* State, 24 Ohio St. 166; Ward *v.* People, 3 Hill, 395.

of the legal possession, or the possession of the goods has been obtained from him by fraud and in pursuance of a a previous intent to steal them.(*p*)

The law on *constructive taking* may be considered under the following heads:—

(a.) Where, by the delivery, the owner of the goods passes not only the possession, but the right of property also.

(b.) Where the possession has been obtained *animo furandi.*

(c.) Where the possession was originally obtained *bona fide*, and without a felonious intent.

(d.) Where the delivery does not alter the possession in law.

(a.) *Where the right of property as well as the possession is parted with by the delivery*, there can be no larceny, however fraudulent are the means by which the delivery of the goods is procured. Of course, the person who committed the fraud is open to a charge for another offense, namely, obtaining goods by false pretenses. If the property has once passed, no subsequent act by the person in whom the right of property has vested can be construed into larceny, whatever the intent of that person may be. Thus A. buys a horse from B., mounts it, says he will return immediately and pay. B. says, "Very well." A. rides away and never returns. There is no larceny, because the property as well as the possession is parted with.(*q*) So in all cases of selling on credit; intrusting with money to get change, etc.

It is the same if the property is passed by the servant of the owner, provided that the servant has authority to part with the property; but not if he has authority to part merely with the possession. Thus, if the servant of B. is authorized only to let out horses on hire, and he, in the case given above, parts with the property in the animal to A., it is larceny in A.(*r*)

(*p*) Arch. 353. From this work is also taken the immediately following classification of cases.

(*q*) R. *v.* Harvey, 1 Leach, 467.

(*r*) v. R. *v.* Middleton, L. R., 2 C. C. R. 38; 42 L. J. (M. C.) 73.

(b.) *Where the possession of goods is obtained animo furandi,*(s) by the offender employing some device, the owner not intending to part with the property in the goods, though he does with the temporary possession. This is larceny though there be a delivery in fact.(1) Thus, A. goes to B.'s shop, and says that C. wants some shawls to look at. B. gives A. some shawls for C. to select from. A. converts them to her own use. This is larceny in A., because, until the selection is made, only the possession and not the property is parted with. It is larceny, if the design of so converting to the accused's own use is present when possession is obtained; but it is not larceny, if such design is conceived only subsequently to the rightfully obtaining possession.(t)

An example of larceny of this class is the practice of ring-dropping. The prisoner pretends to find a ring wrapped in paper appearing to be a jeweler's receipt for a "rich, brilliant diamond ring." He, with his accomplices, offers to leave the ring with the victim, if the latter will deposit his watch or some money as security for the return of the ring. The watch or money is taken away by the prisoner's party, and the victim finds that the value of the ring is much below that of the goods he has parted with.(u) The fact that there is an actual delivery of goods does not divest the deed of the character of larceny, if the defendant, having the *animus furandi*, obtains them by frightening or threatening the owner, as, for example, in mock auctions.(x) And it is immaterial that some money was at the time owing from the prosecutor to prisoner.(y)

Some of the cases under this head, which have been decided to be larceny, show how very narrow the line is between larceny and non-larceny or false pretenses. Thus, when A. obtained from B. a sum of money, under the false color of winning a bet, it was held to be larceny, because, at the time the defendant obtained the money from the

(s) As to what constitutes *animus furandi*, or felonious intent, v. p. 174.
(t) R. v. Savage, 5 C. & P. 143. (u) R. v. Patch, 1 Leach, 238.
(x) R. v. M'Grath, L. R., 1 C. C. R. 205; 39 L. J. (M. C.) 7.
(1) Elliott v. Commonwealth, 12 Bush, 176; Kellogg v. State, 26 Ohio St. 15.
(y) R. v. Lovell, 8 Q. B. D. 185; 50 L. J. (M. C.) 91; 44 L. T. N. S. 819.

prosecutor, he parted with the possession only, and the property was to pass eventually only if the other party really won the wager.(*y*)

(c.) *Where the possession of the goods is obtained lawfully and bona fide, without any fraudulent intention in the first instance.*—Though the person thus obtaining possession afterward fraudulently appropriated the goods to his own use, he would not be guilty of larceny at common law. However, it would be otherwise, if the possession was obtained by trespass, and then there was a subsequent fraudulent appropriation, though there was no fraudulent intention at first.(*z*)

In accordance with the above rule, in no case of bailment, where the possession was at first obtained innocently, could the bailee be found guilty of larceny. [That is, where he takes an entire thing or a package bailed. But, if a common carrier breaks bulk—that is, breaks open a package and takes part of the contents—he commits larceny at common law.(1)] But the legislature has interfered, and enacted that the fraudulent taking or converting any chattel, money, or valuable security, by the bailee of such property, to his own use, or to the use of some other person than the owner, although he do not break bulk or otherwise determine the bailment, is larceny.(*a*). But a person can not be convicted of larceny as a bailee, unless the bailment be to re-deliver the very same chattel or money.(*b*)

As we shall see, the larceny act deals specifically with the cases of certain persons who are intrusted with money or goods, *e. g.*, banker, broker, etc. The crime of embezzlement is also concerned with appropriations by those to whom property has been delivered, though not by the person who is wrongfully deprived.

(d.) *Where the delivery does not alter the possession in law.*

(*y*) R. *v.* Robson, R. & R. 413; v. R. *v.* Wilkins, 1 Leach, 520.

(*z*) R. *v.* Riley, 22 L. J. (M. C.) 48. (*a*) § 3.

(*b*) R. *v.* Hassell, 30 L. J. (M. C.) 175.

(1) Rex *v.* Madox, R. & R. 92; Rex *v.* Brazier, R. & R. 337; Regina *v.* Calhoun, 2 Crawf. & Dix, C. C. 57; Rex *v.* Howell, 7 C. & P. 325.

in other words, where, although there is a delivery of the goods by the owner, yet the possession in law remains in him, the goods may be stolen by the person to whom they are thus delivered. Thus it is larceny at common law for a servant who has merely the care and oversight of the goods of his master, as the butler of the plate, to appropriate those goods. And here the felonious intention need not exist at the time of the delivery, inasmuch as the delivery is merely for custody, the possession legally remaining in the master. The master must have been in possession; for if the goods are delivered to the servant for the master's use, and the servant does not deliver, but converts them to his own use, this is not larceny, but embezzlement; as if a shopman receives money from one of his master's customers, and, instead of putting it into the till, secretes it.(*d*)

[But if a servant, going for coal for his master, takes his master's cart along, the coal, on being put into the cart, is in the master's possession; and if the servant should convert any of such coal, even before returning home, he commits larceny. Regina *v.* Reed, Dears, 257; 24 Eng. L. & E. 562. And where a corn factor purchases an entire cargo of corn, which purchase transfers ownership, and operates as a delivery, if he send his servant to bring a portion of such cargo, and the servant takes some of it directly from the ship, with felonious intent, he commits larceny. Rex *v.* Abrahat, 2 Leach, 824.]

There are other cases in which the possession, though physically parted with, still remains unmoved in the eye of the law. For example, when the owner is present all the time the goods are in the physical possession of the accused, and has no intention of relinquishing his dominion, as when a lady handed a sovereign to the prisoner, asking him to procure her a ticket, and he ran off with it, he was convicted of larceny.(*e*)

So, a bare use of the goods of another does not divest the owner of his possession in law. Thus, it is larceny for a person to fraudulently convert to his own use the plate which he is using at an inn.(*f*)

The taking must be of another's goods. Therefore a person can not steal his own goods, if they are in his own possession, though he defraud his creditors by the removal; but, otherwise, if they are

(*d*) R. *v.* Bull, 2 Leach, 841. (*e*) R. *v.* Thompson, 32 L. J. (M. C.) 53.

(*f*) A reference to the explanation of the term "possession" (p. 159) will show that in the above cases the owner, in strictness, has not parted with the possession.

in the hands of a bailee, and the taking of them has the effect of charging the bailee.(*g*)

So, also, if one of several joint tenants or tenants in common of personal goods disposed of them, it was not larceny at common law, for the disposer was already in possession.(*h*) But it has been enacted that any member of a copartnership, or one of two or more beneficial owners of property, steals any such property, he is liable to be dealt with as if he had not been in such position.(*i*)

Until lately husband and wife, being one in law, could not steal each other's goods; so that if the goods of the husband were taken with the consent or privity of the wife, it was not larceny, unless the taker was the avowterer of the woman.(*k*) And so the avowterer could not be convicted merely of receiving the goods of the husband which had been taken by the wife alone and received by him from the wife.(*l*) But now by the Married Women's Property Act, 1882, every woman, whether married before or after that Act, has in her own name, against all persons, including her husband, the same remedies and redress by way of criminal proceedings, for the protection and security of her own separate property, as if such property had belonged to her as a *feme sole*. But no such criminal proceeding can be taken by any wife against her husband, while they are living together, concerning any property claimed by her; nor while they are living apart as to any act done by the husband, while they were living together, concerning property claimed by the wife, unless such property has been wrongfully taken by the husband when leaving or deserting his wife.(*m*) In like manner a wife doing any act with respect to any property of her husband, which if done by the husband with respect to the property of the wife would make the husband liable to criminal proceedings by the wife, is liable to criminal proceedings by her husband.(*n*) In any such proceedings by the wife against her husband, it is sufficient to allege such property to be the wife's property.(*o*)

When does the appropriation of things *found* amount to an unlawful and felonious taking? The true rule was laid down in R. *v.* Thurburn.(*p*) "If a man find goods that have been actually

(*g*) v. R. *v.* Wilkinson, R. & R. 470.

(*h*) This does not apply to corporations, because there individual members have not the right of possession or property.

(*i*) 31 and 32 Vict., c. 116, § 1. (*k*) R. *v.* Tolfree, 1 Mood. C. C. 243.

(*l*) R. *v.* Kenny, L. R. 2 Q. B. 307; 46 L. J. (M. C.) 156.

(*m*) 45 and 46 Vict., c. 75, § 12. (*n*) 45 and 46 Vict., c. 75, § 16.

(*o*) Ibid., § 12. (*p*) 18 L. J. (M. C.) 140; 2 C. & K. 831.

lost, and appropriate them, with intent to take the entire dominion over them, really believing when he takes them that the owner can not be found, it is not larceny. But if he takes them with the like intent, though lost, or reasonably supposed to be lost, but reasonably believing that the owner can be found, it is larceny." Thus, to make finding larceny, there must be on the part of the finder both this belief and this intention at the *time of the finding.* [For if he takes them with intent to keep them for the owner and return them, and subsequently forms the purpose of converting them to his own use, there is no larceny.(1)]

As to the taking *physically* regarded.—In the "taking" we have included what is frequently considered as a separate ingredient of larceny—*carrying away* or *asportation.* This asportation must be proved, as well as a bare taking. Thus, to handle a bale of goods is not larceny; but the slightest removal will suffice; it is not necessary that the prisoner should succeed in carrying the goods away. Thus, removing the goods from the head to the tail of the wagon, with intent to steal; or, with like intent, drawing a book from a a coat an inch above the pocket, though it fall back again, is enough to constitute an asportation.(*q*) But there must be some severance; and, therefore, where the goods could not be carried off because of a string attaching them to the counter, the prisoner was acquitted.(*r*) [If a person put his hand into a drawer and take money therein into his hand, removing it from its place with intent to steal, the larceny is complete, though the money is not taken out of the drawer, and is dropped as soon as lifted, the person being discovered in the act.(2)]

Not that in such cases the offender will be altogether out of the reach of the criminal law; he may be indicted for an attempt to steal; or upon the indictment for larceny he may be found guilty of and punished for an attempt.(*s*) But he can be convicted of an attempt only where, if no interruption had taken place, the design would have been carried out successfully; therefore, putting one's hand into an empty pocket, with intent to steal, will not constitute an attempt.(*t*) Here again, however, though the prisoner can not be convicted of the attempt, he is guilty of a common-law misdemeanor.

(*q*) R. *v.* Thompson, 1 Mood. C. C. 78.
(*r*) 2 East, P. C. 556. (*s*) v. p. 20; 14 and 15 Vict., c. 100, § 9.
(*t*) R. *v.* Collins, 33 L. J. (M. C.) 177.
(1) Baker *v.* State, 29 Ohio St. 184. For a full discussion of what are lost goods, see Bowen et al. *v.* Sullivan, Guardian, Supreme Court of Indiana, Nov. 1878.
(2) Eckels *v.* State, 25 Ohio St. 508.

iii. *The intent permanently to deprive the owner of his property—the animus furandi*—the felonious intent.

This is an essential constituent of larceny, and therefore are excepted from criminal liability those who are merely trespassers. Thus, if I take my neighbor's horse out of his stables, and ride it in open day for a few miles, where I am well known, there would be a mere trespass, and no ground for a charge of larceny, however much I may be at enmity with my neighbor. So, also, are exempted those who take goods under a *bona fide* claim of right, however unfounded that claim may be; as if, under color of arrears of rent, although none is actually due, I distrain or seize my tenant's cattle; this may be a trespass, but is no felony. [The wrongful taking and carrying away of the property of another, without his consent, with intent to conceal it until the owner offers a reward for its return, and for the purpose of obtaining the reward, is larceny.(1)]

As we have already noticed,(*q*) the felonious intent must exist at the time of taking. The intent must, of course, be inferred from the circumstances of the case: among the more common *indicia* of this felonious intent being the doing the act clandestinely, the denying it when charged, etc. It will be for the jury to decide whether the felonious intent has been proved; or rather, whether the prisoner has established the absence of such intent; for it is a general presumption of the law that when a party takes wrongful possession of goods belonging to another, his intent is to deprive the owner of them, that is, to steal them. Returning the goods is strong evidence that the intent was not felonious, though it is not conclusive evidence, inasmuch as the prisoner would be convicted, if from other circumstances it is proved that the felonious intent was present at the time of taking, though it was afterward abandoned.

It is not necessary that the taking should be *lucri causa*, or with the object of gain of a pecuniary character. For example, it was held to be larceny for a man to take another's horse, back it into a pit, and thereby kill it, the ob-

(*q*) v. p. 169.

(1) Berry *v.* State, 31 Ohio St. 219.

ject here being to screen an accomplice.(*r*) And so a person was convicted of larceny who destroyed a letter in order to suppress inquiries as to behavior supposed to be contained therein.(*s*) But in such cases as these it is perhaps possible to extend the meaning of *lucri causa* to any advantage to be obtained by the prisoner on the commission of the crime; and then this term could be applied to any case of larceny. An extreme example of this kind of advantage derived from the wrongful dealing with the goods of another is one which was formerly sufficient to constitute larceny, but which now is specially provided for by statute, namely, the case of servants supplying their masters' horses, etc., with food additional to the quantity usually allowed. The later cases on the subject went so far as to establish that it was larceny, even if the intent of obtaining a private benefit (*e. g.*, ease in looking after the horses) was negatived.(*t*) The statute(*u*) enacts that such conduct shall be punished, on summary conviction, by imprisonment not exceeding three months, or fine not exceeding £5; and that the magistrate may dismiss the case if he think it too trifling.

In the same indictment against the same person there may be inserted *several counts* for any number of distinct acts of stealing, not exceeding three, which may have been committed by him against the same person within the space of six months from the first to the last of such acts; and it is lawful to proceed thereon for all or any of them.(*v*) If, at a trial for larceny, it appears that the property alleged to have been stolen at one time was taken at different times, the prosecution is not required to elect upon which taking he will proceed, unless it appears that there were more than three takings, or that more than the space of six months elapsed between the first and last of such takings. In either of such last mentioned cases the prosecution is required to elect to proceed for such number of takings, not exceeding three, as appear to have taken place

(*r*) R. *v.* Cabbage, R. & R. 292.
(*s*) R. *v.* Jones, 2 C. & K. 236
(*t*) R. *v.* Privett, 2 C. & K. 114.
(*u*) 26 and 27 Vict., c. 103, § 1
(*v*) § 5.

within the period of six months from the first to the last of such takings.(*x*)

A person indicted for larceny is not to be acquitted because it is proved that he is guilty of embezzlement, and *vice versa*; so that the prisoner will be punished for whichever of these crimes he is found guilty of by the jury, although he may have been indicted for the other.(*y*)

As to the *place of trial*.—The thief may be tried in any county of the United Kingdom in which he has any of the stolen or feloniously taken property, and this irrespective of the length of time since the commission of the larceny,(*z*) for in the eyes of the law he is guilty of a taking in every county through or in which the goods have been taken by him.(*a*) (1)

(*x*) § 6. (*y*) § 72. (*z*) § 114.

(*a*) See further as to place of trial, p. 337; restitution of property, p. 433; apprehension of offenders, p 309; costs, p. 446.

(1) But if a person steal goods in France and bring them into England, he can not be convicted of larceny in England. Regina *v.* Madge, 9 C. & P. 29.

In the United States, it is a disputed question, if a person, having stolen goods in one state, and gone with them into another state, can be convicted of larceny in the latter state. It is held that he can be, in Commonwealth *v.* Holder, 9 Gray, 7; State *v.* Ellis, 3 Conn. 185; State *v.* Seay, 3 Stewart, 123; Watson *v.* State, 36 Miss. 593; Ferrell *v.* Commonwealth, 1 Duvall, 153; Hamilton *v.* State, 11 Ohio, 435; Hemmaker *v.* State, 12 Mo. 453; State *v.* Bennett, 14 Iowa, 479. The same rule is adopted by statute in New York and Michigan. People *v.* Burke, 11 Wend. 129; People *v.* Williams, 24 Mich. 156. The contrary rule is held in State *v.* Blanch, 2 Vroom (31 N. J.), 82; Simmons *v.* Commonwealth, 5 Binn. 617; State *v.* Brown, 1 Hayward (N. C.), 100; Simpson *v.* State, 4 Humph. 456; State *v.* Reonnals, 14 Lou. Ann. 278; Beal *v.* State, 15 Ind. 378.

It has been further held, that where a larceny has been committed in a foreign country, and the thief comes to one of the United States with the stolen goods, he can be convicted of larceny in such state State *v.* Underwood, 49 Maine, 181; State *v.* Bartlett, 11 Vermont, 650. And this rule has been adopted by statute in Michigan, Rev. Stat., 1871, p. 2091; and New York, People *v.* Burke, 11 Wend. 129. The contrary is held in Commonwealth *v.* Uprichard, 3 Gray, 434, and Stanley *v.* State, 24 Ohio St. 166.

COMPOUND OR AGGRAVATED LARCENY.

Larceny attended by circumstances of aggravation is punished more severely than simple larceny. This increased severity is the test to indicate what the law regards as aggravations. In compound larceny all the elements of simple larceny are present; and, in addition to these, the special features which constitute the aggravation. If the prosecution fail to prove such additional circumstances, the prisoner may be found guilty of simple larceny.

"The principal aggravations now in force are either in respect of the *nature of the thing stolen*, as in the case of cattle,(*g*) goods in the process of manufacture,(*h*) and wills;(*i*) or in respect of the *manner* in which they are stolen, as with or without arms and violence;(*j*) or in respect of the *place* from which they are stolen, as from the person,(*k*) in a dwelling-house to the value of £5,(*l*) in a church or chapel,(*m*) from a ship in harbor,(*n*) and from a ship in distress;(*o*) or in respect of the *person* by whom they are stolen, as in the case of agents,(*p*) bankers,(*q*) and fraudulent trustees,(*r*), servants,(*s*) public officers,(*t*) and persons previously convicted."(*u*)

(e.) *Robbery.*(*v*)

Larceny from the person is either by privately stealing, or by open and violent assault. The latter, usually termed "robbery," will be treated of first, the former comprising all other cases of stealing from the person.

Robbery is the felonious and forcible taking from the person of another, or in his presence, against his will, of any money or goods to any value, by violence or putting him to fear. The rules of larceny in general apply, and therefore the prosecution must prove the same points as in larceny, and certain others in addition.

The gist of this crime is *force* or *bodily fear*. It is not necessary to show that both were present. Though no violence was used, it will suffice if it can be proved that the goods were delivered to the prisoner by the party robbed under the impression of a certain degree of *fear* and apprehension. What is that degree of fear? On the one hand, the fear is not confined to an apprehension of bodily injury, and on the other hand, it must be of such a nature as in reason and common experience is likely to induce a person to part

(*g*) v. p. 162. (*h*) v. p. 171. (*i*) v p. 168 (*j*) v. p. 169.
(*k*) v. p. 173. (*l*) v. p. 210. (*m*) v. p. 209. (*n*) v. p. 171.
(*o*) Ibid (*p*) v. p. 183. (*q*) Ibid. (*r*) Ibid.
(*s*) v. p. 171. (*t*) v. p. 172. (*u*) v. p. 397; Fitz St. 188.
(*v*) As to piracy or robbery on the high seas, v. p. 43.

with his property against his will, and to put him, as it were, under a temporary suspension of the power of exercising it through the influence of the terror impressed.(*w*) It is not necessary that the danger should be impending on the person of the party robbed; it may be on those dear to him, as his children or on his house.(*x*) There is no reason why the personal character of the person robbed should lighten the offense of the robber; therefore it is not necessary to prove that the fear actually existed, if it be shown that the circumstances are such as are calculated to create a fear of the nature indicated. And if this be shown, the resort to some pretense by the offender will not divest the act of the character of robbery; as if a person with a sword begs alms; by the same means compels some one to swear that he will return with money, the fear of the menaces still continuing to operate when the money is delivered.

Though there be no fear, yet if there is actual *force* or *violence*, it is a robbery; as where the prisoner knocks down the prosecutor from behind, and steals from him his property while he is insensible on the ground. But the rule appears to be well established that no sudden taking or snatching of the property unawares from a person is sufficient to constitute robbery unless some injury be done to the person, or there be a previous struggle for the possession of the property, or some force used to obtain it.(*y*)

The force or fear must precede or accompany the taking, so that a subsequent scuffle or putting to fear in order to keep the property will not constitute a robbery.

To constitute a taking, the robber must actually obtain possession of the goods; so that it would not be robbery to cut a man's girdle in order to get his purse, the purse thereby falling to the ground, if the robber was compelled to run off before he could take it up.

The taking must be *from the person*, or *in the presence* of the party robbed. Thus it is robbery to put a man in fear, and then in his presence to drive away his cattle. So also by threats to compel him to deliver up his property, though the robber never touch his person. In the case of simple larceny, there must be some severance of the property. In robbery there must be something more, namely, a complete removal from the person of the party robbed. Removal from the place where it is, if it remains throughout with the person, is not sufficient.(*z*)

(*w*) R. *v.* Donnally, 2 East, P. C. 713.
(*x*) R. *v.* Astley, 2 East, P. C. 729.
(*y*) Arch. 438; R. *v.* Steward, 2 East, P. C. 702.
(*z*) R. *v.* Thompson, 1 Mood. C. C. 78; but see R. *v.* Lapier, 1 Leach, 320

The taking must be *against the will* of the person robbed. Therefore when he, though a third party, procured others to commit the robbery in order that he might get the reward upon conviction, it was held not to be robbery.(*a*)

Robbery may be punished by penal servitude to the extent of fourteen years.(*b*) If the robbery is accompanied by violence, either at the time of, or immediately before or immediately after such robbery; or if the robbery, or assault with intent to rob, is by a person armed with an offensive weapon or instrument; or if the robbery or assault with intent to rob is by two or more persons, penal servitude to the extent of life may be awarded.(*c*) By a latter statute, in the case of a male, sentence of private whipping, once, twice, or thrice may be added.(*d*)

(f.) *Stealing from a person.*

Under this head fall all other cases of stealing from the person, not attended by violence or putting to bodily fear. Of this nature is pocket-picking, when the offense is committed privily. An actual taking must be proved, inasmuch as the nature of the case precludes there being any thing like a constructive taking, such as the delivery, etc., in robbery.

The principles of robbery, as to the severance, taking, intent, etc., generally apply. The punishment is the same as for simple robbery, namely, penal servitude to the extent of fourteen years.(*e*)

Assault with intent to rob.

It seems convenient to notice this offense here, seeing that the evidence upon an indictment for such assault usually proves a robbery, with the exception of a taking and carrying away, which for some reason, are not effected. No actual violence need be done; but any thing done in the presence of the party intended to be robbed, with reference to him, in furtherance of the intent to rob him, will constitute the assault.(*f*) Nor need there be any demand of money.

The punishment for this felony (save and except where a greater punishment is provided by the act (*g*) is penal servitude to the extent of five years.(*h*)

If, on an indictment for robbery, the jury are of opinion

(*a*) R. *v.* Macdaniel, Fost. 121, 128; Cf. R. *v.* Eggington, p. 197; R. *v.* Williams, 1 C. & K. 195.

(*b*) § 40.

(*c*) § 43.

(*d*) 26 and 27 Vict., c. 44.

(*e*) § 40.

(*f*) Arch. 445.

(*g*) These cases are noticed.

(*h*) § 42.

that the prisoner did not commit the robbery, but did commit an assault with intent to rob, they may find him guilty of the latter offense, and he will be punished accordingly.(*o*) But on an indictment for assault with intent to rob, the defendant can not be convicted of a common assault.(*p*)

RECEIVING STOLEN GOODS.

["Whoever shall receive any stolen goods, chattels, or other thing, the stealing whereof is punished as a felony or misdemeanor, knowing the same to be stolen, shall be liable to the same punishment to which the person stealing the same is by law subjected. Such offenders may be convicted, though the principal offender has not been convicted." Rev. Stat. (1877), Kentucky, 335. "Whoever buys, receives, or conceals any thing of value which has been stolen, taken by robbers, embezzled, or obtained by false pretense, knowing the same to have been stolen, taken by robbers, embezzled, or obtained by false pretense, shall be deemed guilty of larceny and punished accordingly." 74 Ohio L. 252. The same provision, with verbal variations, is in Indiana. Rev. Stat. (1876), 434; Illinois, Rev. Stat. (1877), 384; Michigan, Rev. Stat. (1871), 2082; and Iowa, Rev. Stat. (1873), 608.]

The offense of receiving stolen property, knowing it to have been stolen, was at common law a misdemeanor only. By the larceny act, 1861, it was made a felony if the principal crime (stealing) amounts to a felony at common law or by that act. So that the only case in which receiving still continues a misdemeanor is where the principal crime is not a felony either at common law or by that act; for example, receiving goods obtained by false pretenses, or obtained by means of the felony established by 31 and 32 Vict., c. 116, § 1.(*d*)

Receivers, where the principal crime amounts to a felony at common law or by the larceny act, may be tried in either one of two capacities:—

(*o*) § 41. (*p*) R. *v.* Woodhall, 12 Cox, 240.
(*d*) R. *v.* Smith, L. R., 1 C. C. R. 266; 39 L. J. (M. C.) 112.

(i.) As accessories after the fact (*i. e.*, of larceny, etc.)

(ii.) As committers of a distinct or substantive felony—and, in this case, whether the principal has or has not been previously convicted, or even if he is not amenable to the criminal law.

The statute(*e*) establishing this optional mode of proceeding, enumerates the offenders subject thereto as—those who receive any chattel, money, valuable security, or other property whatsoever, the stealing, taking, extorting, obtaining, embezzling, or otherwise disposing whereof amounts to a felony, either at common law or by virtue of that act, knowing the same to have been feloniously stolen, taken, etc.

The larceny or other felonious taking must be proved. For this and every other purpose, the principal felon is a competent witness; but, of course, the jury will form their own opinion as to the weight of his testimony; and, if the thief is the only witness, the judge will advise an acquittal.(*f*)

Next, it must be proved that the goods were received by the prisoner into his actual possession; though a manual possession is not necessary.(*g*) The goods being found in his possession is good presumptive evidence of his having received them.

The knowledge of the prisoner, *at the time he received the goods*, that they were stolen, is proved either directly, by the evidence of the principal felon, or circumstantially, as by showing that the prisoner bought them much under their value, denied that he had them in his possession, etc. Evidence may also be given that there was found in his possession other property stolen within the preceding twelve months. And, again, if evidence has been given that the stolen property has been found in his possession, at any stage of the proceedings evidence may be given of a conviction, within the five years immediately preceding, of any offense involving fraud or dishonesty. But, in this

(*e*) 24 and 25 Vict., c. 96, § 91. (*f*) R. *v.* Robinson, 4 F. & F. 43.
(*g*) R. *v.* Smith, 24 L. J. (M. C.) 135.

last case, seven days' notice in writing must be given to the accused, that proof is intended to be given of such previous conviction.(*h*)

The allowing evidence of a previous conviction to be given during the course of a trial, so that it may affect the minds of the jury, is an exception to the usual policy and practice of our criminal law. [This exception has been created in England by statute, and has not been adopted in the United States.] As a rule, the only influence which a previous conviction is allowed to exert, is, after the verdict has been given, on the judge, in determining the sentence.

The punishment for the felonious receiving is penal servitude to the extent of fourteen years.(*i*) But receiving a post-letter, a post letter-bag, or any chattel, or money, or valuable security, the stealing, or taking, or embezzling, or secreting whereof amounts to a felony, under the post-office acts, knowing the same to have been feloniously stolen, etc., and to have been sent, or to have been intended to be sent, by post, is punishable by penal servitude to the extent of life, or imprisonment not exceeding four years.(*k*)

Where the principal offense is a misdemeanor by the larceny act, *e. g.*, if the property has been obtained by false pretenses, the receiver, knowing that the property has been unlawfully stolen, taken, obtained, converted, or disposed of, is also guilty of a misdemeanor, punishable by penal servitude to the extent of seven years.(*l*)

Where the principal offense is punishable on summary conviction, the receiver is liable, on summary conviction, to the same punishment to which the principal is liable for stealing or taking such property on the same conviction (*i. e.*, the first, second, or subsequent).(*m*)

Contrary to the general rule, which does not admit of different felonies being charged in different counts of the indictment,(*n*) in an indictment for stealing any property, it is lawful to add a count or counts for feloniously receiv-

(*h*) 34 and 35 Vict., c. 112, § 19.
(*i*) § 91.
(*k*) 7 Wm. 4, and 1 Vict., c. 36, §§ 30, 41.
(*l*) § 95.
(*m*) § 97.
(*n*) v. p. 2[illegible]

ing the same, or any part or parts thereof. And, conversely, in an indictment for receiving, it is lawful to add a count for feloniously stealing the same. It is for the jury to say of which offense they find the prisoner guilty; or, if there are more prisoners than one, it is for the jury to say which are guilty of each offense.(*o*)

Any number of receivers, though they received at different times, of the property which has been stolen or otherwise disposed of in such manner as to amount to a felony at common law, or by the larceny act, may be charged with substantive felonies (*i. e.*, of receiving) in the same indictment, and tried together.(*p*) And, in any case, upon the trial of two or more indicted for jointly receiving, the jury may convict one or more of separately receiving.(*q*)

We frequently hear of the so-called doctrine of *recent possession*, that is, of the possession of property within a short time after it has been stolen. Why a matter of mere common sense should be elevated to the style of a "doctrine" it is not easy to see. What is meant is only that, according to the circumstances of the case, the recent possession is evidence that the person in possession stole the property, or received it, knowing it to have been stolen. This evidence may be of the strongest, or of hardly any weight at all. It will vary not only according to the length of time, but also according to other considerations, one of the chief of which is the nature of the property, whether it be of a description which can easily pass from one person to another. Thus the possession of a diamond ring a year after the theft would be more indicative of a felonious intent than the possession of a pound of cheese after the lapse of a week.(*u*).

(*o*) § 92. (*p*) § 93. (*q*) § 94.

(*u*) R. *v.* Partridge, 7 C. & P. 551; R. *v.* Langmead, L. & C. 427; R. *v.* Deer, 32 L. J. (M. C.) 33.

CHAPTER II.

EMBEZZLEMENT.

EMBEZZLEMENT may be defined as the unlawful appropriation to his own use by a servant or clerk of money or chattels received by him for and on account of his master or employer.(1) It differs from larceny by clerks or servants in this respect: embezzlement is committed in respect of property which is not at the time in the actual or legal possession of the owner, whilst in larceny it is. An example will illustrate the distinction. A clerk receives £20 from a person in payment for some goods sold by his master; he at once puts it into his pocket, appropriating it to his own use; this is embezzlement. The clerk appropriates to his own use £20 which he takes from the till; this is larceny. The line of demarcation between the two offenses appear sometimes to be very finely drawn.(*x*) This would be liable to work injustice, were it not for a provision to which we shall shortly have to refer.(*y*)

The principal points to be noticed are the following:

(i.) Proof that the prisoner was employed as clerk or servant.

(*x*) It is urged that there is no ground for preserving the distinction. This would especially be the case if the principle of possession of the servant being the possession of the master had been interpreted with the same latitude in criminal and civil cases.—Rosc. 453.

(*y*) v. p. 187.

(1) It was formerly held that when the clerk or servant converted to his own use money or goods received by him for his master but which had not got into his master's possession, such act was not larceny or other crime, but only a breach of trust. Bull's Case (1797), Leach, 841, East, P. C. 572; Bazely's Case (1799), Leach, 835, East, P. C. 571. In consequence of these decisions, parliament passed the act, 39 Geo. 3, c. 85, entitled "an act to protect masters against embezzlements by their clerks or servants," and the crime of embezzlement was thereby created. 1 Gabbett Crim. Law, 556.

(ii.) Proof of his receipt for, or in the name of, or on account of, the employer or master.

(iii.) Proof of the unlawful appropriation.

(i.) *Proof of the employment as clerk or servant.*

It is for the jury to determine whether the prisoner is a clerk or servant, within the meaning of the statute, the court explaining what is necessary to constitute such a relation.

The clerks or servants need not be in the employment of those in trade. The particular name by which they are called, as accountant, collector, overseer, etc., is not material, if the general relationship can be proved.(*z*) It is a very difficult matter to determine whether the required relationship exists. The various tests which have been suggested all appear in turn to have been overruled. The employment need not be continuous, for it was held to be embezzlement, though the prisoner was employed to receive in a single instance only.(*a*) The mode of remuneration for service is not decisive, that is, whether by commission or by salary. This will not distinguish an agent from a servant.(*b*) Nor will a participation in the profits of the sale prevent the character of servant from arising.(*c*) The question is not decided by the consideration whether the whole or only a part of a man's time is devoted to the other's business,(*d*) nor whether he is bound to obey the latter's directions.(*e*) A person who is employed as servant by several is considered the individual servant of each.(*f*)

Embezzlement by persons employed in the public service, or by police constables, of any chattel, money, or valuable security which is intrusted to, or received, or taken into

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(*z*) v R. *v.* Squire, R. & R. 349.

(*a*) R. *v.* Hughes, 1 Mood. C. C. 370. (*b*) R. *v.* Bailey, 12 Cox, 56.

(*c*) R. *v.* Atkinson, 2 Mood. C. C. 278.

(*d*) R. *v.* Tite, 30 L. J. (M. C.) 142.

(*e*) v. R. *v.* Spencer, R. & R. 299.

(*f*) 3 Stark. N. P. 70. The reader is referred to the cases given by Archbold, Roscoe, etc., for a fuller examination of this difficult point, whether the relationship required by the statute exists; v. especially R. *v.* Negus, L. R., 2 C. C. R. 34; 42 L J. (M. C.) 62.

possession by virtue of their employment, is subjected to generally the same consequences as if the embezzlement were from an ordinary master.(*g*)

(ii.) *The receipt for, etc., the master.*

The mere fact of receipt is usually proved by the person who gave the money, etc., to the prisoner, or by his own admission. That he received it for, in the name of, or on account of his master, the jury may infer from the circumstances of the case. But it will not be embezzlement if the prisoner received the money from his master in order to pay to a third person.(*h*) Nor if the money is already constructively in the possession of the master, by the hands of any other clerk or servant.(*i*). It is immaterial that the money was not really due to the master. The receipt need not now be by virtue of his employment in order to constitute embezzlement; and therefore it may be embezzlement, though the servant had no authority to receive. But it is necessary that the money, etc., should be the property of the master when received by the servant; and, therefore, money appropriated by a servant, in consideration of work which the prisoner did by the unauthorized use of his master's tools, the payer contracting with the servant only, does not constitute embezzlement.(*k*)

(iii). *The unlawful appropriation.*

The usual evidence given of the appropriation is, that having received the money, etc., the prisoner denied the receipt, or accounted for moneys received at the same time, or after, and not for it, or rendered a false account, or practiced some other deceit in order to prevent detection.(*m*)

The mere non-payment to the master of money which the servant had charged himself in his master's book with receiving is not embezzlement.(*n*) But, on the other hand, it is no defense to merely show that he entered the receipt correctly in the master's book.(*o*) If, instead of denying

(*g*) 24 and 25 Vict., c. 96, § 70

(*h*) R. *v.* Smith, R. & R. 267. (*i*) R. *v.* Wright, 27 L. J. (M. C.) 65

(*k*) R. *v.* Cullum, L. R., 2 C. C. R. 28; 42 L. J. (M. C.) 64.

(*m*) Arch. Q. S. 540. (*n*) R. *v.* Hodgson, 3 C & P. 422.

(*o*) R. *v.* Lister, 26 L. J. (M. C.) 26.

the appropriation of property, the prisoner, in rendering his account, admits the appropriation, alleging a right in himself, no matter how unfounded, or setting up an excuse, no matter how frivolous, his offense in taking and keeping is no embezzlement.(*p*) But where it is the prisoner's duty, at stated times, to account for and pay over to his employer the money received during those intervals, his willfully omitting to do so is embezzlement, and equivalent to a denial of the receipt of them.(*q*)

It appears that now some specific sum must be proved to have been embezzled. It will not suffice to prove a general deficiency in the prisoner's accounts.(*r*)

There may be charged in the same indictment, and the defendant may be tried, at the same time for, any number of distinct acts of embezzlement, not exceeding three, which may have been committed by him against her majesty, or against the same master or employer, within six months from the first to the last of such acts.(*s*) As we have already seen, a person indicted for embezzlement may be found guilty of, and punished for, larceny, and *vice versa*.(*t*)(1)

The punishment for embezzlement is penal servitude to the extent of fourteen years.(*u*)

The summary jurisdiction given by 18 and 19 Vict., c. 126, to justices assembled at petty sessions (*x*) in certain cases of larceny is extended to similar cases of embezzlement.(*y*)

Falsification of accounts.

An offense of a kindred nature may be noticed here. For a clerk, officer, servant, or other *employe* to willfully and with intent to defraud, destroy, alter, mutilate, or falsify any of his employer's books, papers, accounts, etc., or make false entries therein, is punishable by penal servitude to the extent of seven years.(*z*)

(*p*) R. *v.* Norman, C. & Mar. 501. (*q*) R. *v.* Jackson, 1 C. & K. 384 (*r*) R. *v.* Lloyd Jones, 8 C. & P. 288; R. *v.* Wolstenholme, 11 Cox 313; see Rosc. 457.

(*s*) 24 and 25 Vict., c. 96, § 71. (*t*) Ibid., § 72; v. p. 176.

(*u*) 24 and 25 Vict., c. 96, § 68. (*x*) v. p. 462.

(*y*) 31 and 32 Vict., c. 116, § 2. (*z*) 38 and 39 Vict., c. 24.

(1) For the practice in the United States, see *post*, under joinder of counts in an indictment. p. 276.

Embezzlement by bankers, merchants, brokers, attorneys, agents, or factors.

If any such person is intrusted with any money or security, with a direction in writing to apply the same for any specified purpose, or to any specified person, and he, in violation of good faith, and contrary to the terms of such direction, converts the same to his own use, or the use of any person other than the one by whom he is so intrusted; or (b) if, having been intrusted as one of the above with any chattel or valuable security, or any power of attorney for the sale or transfer of any share or interest in any stock or fund, for safe custody or for any special purpose, without authority to sell, negotiate, transfer, or pledge, he, in violation of good faith and contrary to the object or purpose specified, sells, negotiates, transfers, pledges, or in any manner converts to his own use, or that of some other person than the one by whom he intrusted, such chattels or security or the proceeds thereof, or the share or interest to which the power of attorney relates, he is guilty of a misdemeanor, and is liable to penal servitude to the extent of seven years.(*a*) There is a saving in this section exempting from such liability trustees and mortgagees; also bankers, etc., in receiving money due on securities, or disposing of securities on which they have a lien.

It is a misdemeanor, attended with the same punishment, for a banker, merchant, broker, attorney, or agent, with intent to defraud, to sell, negotiate, etc., any property with which he is intrusted for safe custody.(*b*) So also for any person intrusted with a power of attorney for the sale or transfer of any property, to fraudulently sell, transfer, or otherwise convert it to his own use, or that of any person other than the one by whom he is intrusted.(*c*)

Factors or agents intrusted, for the purpose of sale or otherwise, with the possession of any goods or of any document of title to goods, who, without the authority of the principal, for their own use or that of any person other

(*a*) 24 and 25 Vict., c. 96, § 75. (*b*) Ibid., § 76. (*c*) Ibid. § 77.

than the one by whom they are so intrusted, and in violation of good faith, make any consignment, deposit, transfer, or delivery of any such goods or document, by way of pledge, lien, or security for any money or valuable security, borrowed by them (the factors, etc.); or (b), without authority, etc., accept any advance of any money or valuable security on the faith of any contract or agreement to consign, etc., such goods or documents, are guilty of a misdemeanor, and punished as above. So also are clerks or others knowingly and willfully assisting in carrying out the aforesaid measures. A saving clause is added, that the factor or agent will not be liable for consigning, etc., if the property is not made a security for, or subject to, the payment of any greater sum of money than the amount which, at the time of the consignment, was due and owing to such agent, from his principal, together with the amount of any bill of exchange drawn by or on account of such principal, and accepted by the factor or agent.(*d*)

Embezzlement by trustees.

For a trustee (or his representative, s. 1) of property for the use of some other person, or for any public or charitable purpose, with intent to defraud, to convert or appropriate the same to his own use, or that of any other person than the person aforesaid, or for any purpose other than such public or charitable purpose, or (b) to otherwise dispose of or destroy the property, is a misdemeanor, punishable by penal servitude to the extent of seven years. But no criminal proceedings may be taken without the sanction of the attorney-general. And, if civil proceedings have been taken against the trustee, the person who has taken such proceedings may not commence any prosecution under this section without the sanction of the court or judge of such civil proceedings.(*e*)

Embezzlement by directors, officers, and members of public companies and corporate bodies.

The following offenses are misdemeanors, punishable by penal servitude to the extent of seven years:

(*d*) 24 and 25 Vict., c. 96, § 78. (*e*) Ibid, § 80.

For a director, member, or public officer of a body corporate or public company, to fraudulently take or apply to his own use, or any use or purpose other than the uses or purposes of such body or company, any of the property of the body or company.(*f*)

For a director, public officer, or manager of such body or company, to receive or possess himself of any of the property of the company, etc., otherwise than in payment of a just debt or demand, and, with intent to defraud, to omit to make or have made a full and true entry thereof in the books and accounts of the company.(*g*)

For a director, manager, public officer, or member, with intent to defraud, to destroy, alter, mutilate, or falsify any book, paper, writing, or valuable security, belonging to the body or company; or (b) to make or concur in making any false entry, or to omit or concur in omitting any material particular in any book of account or other document.(*h*)

For a director, manager, or public officer to make, circulate, or publish, or concur in making, etc., any written statement or account which he knows to be false in any material particular, with intent to deceive or defraud any member, share-holder, or creditor of such body or company, or with intent to induce any person to become a share-holder or partner therein, or to intrust or advance any property to such body or company, or to enter into any security for the benefit thereof.(*i*)

With regard to these cases of embezzlement by bankers, merchants, attorneys, agents, or factors, trustees, directors, officers, or members of bodies corporate or public companies, the provisions as to which are contained in §§ 75–84 of the larceny act, it is enacted that no person shall be convicted of any of these misdemeanors, if he shall, at any time previously to his being charged with such misdemeanor, have disclosed the act on oath, in consequence of any action which shall have been *bona fide* instituted by

(*f*) 24 and 25 Vict., c. 96, § 81.
(*g*) Ibid., § 82.
(*h*) Ibid., § 83.
(*i*) Ibid., § 84.

any party aggrieved; or if he shall have first disclosed the same in any compulsory examination or deposition before any court upon the hearing of any matter in bankruptcy or insolvency.(*k*)

For a director, officer, or contributory of a company wound up under the companies act, 1862, to destroy, mutilate, alter, or falsify any books, papers, writings, or securities, or to make or be privy to making any false or fraudulent entry in any book or other document of the company, with intent to defraud or deceive any person, is a misdemeanor, punishable by imprisonment not exceeding two years.(*l*)

For an officer of a savings bank to receive any deposit and not pay over the same is a misdemeanor, punishable by fine or imprisonment or both.(*m*)

[In Ohio, the general provision is, "an officer, agent, clerk, servant, or employe of any person (except apprentices and persons under the age of eighteen years), who embezzles or converts to his own use, or fraudulently takes, or makes away with, or secretes, with intent to embezzle or convert to his own use, any thing of value which shall come into his possession by virtue of his employment; and an officer elected or appointed to an office of public trust or profit in this state, and an agent, clerk, servant, or employe of such officer, or of a board of such officers, who embezzles or converts to his own use, or conceals with such intent, any thing of value that shall come into his possession by virtue of his office or employment, is guilty of embezzlement, and shall be punished as for larceny of the thing embezzled." 74 Ohio L. 249, § 11. The word person in-

(*k*) 24 and 25 Vict., c. 96, § 85. And also nothing in these sections shall entitle any person to refuse to answer a question in a civil proceeding, on the ground that it tends to criminate himself.—§ 85. The criminal proceeding is not to deprive any party of his civil remedy, but the conviction is not to be evidence in such civil suit.—§ 86.

(*l*) 25 and 26 Vict., c. 89, § 166.

(*m*) 26 and 27 Vict., c. 87, § 9. False statements, returns, etc., by railway companies, v. 29 and 30 Vict., c. 108, §§ 15–17; 31 and 32 Vict., c. 119, § 5; 34 and 35 Vict., c. 78, § 10.

cludes corporations. Ibid. 241. Thing of value in this section includes negotiable instruments, negotiable by delivery, not yet delivered or issued as a valid instrument. Ibid. 250. Carriers and innkeepers who convert fraudulently any thing of value intrusted to them in the course of their vocation, are guilty of embezzlement; also a carrier, warehouseman, factor, storage, or commission merchant who, with intent to defraud, sells or converts any bill of lading, permit, or receipt, or any property, or proceeds thereof; any municipal officer who knowingly diverts, appropriates, or applies any public funds; any person intrusted with any public property of the state, a county, township or municipal corporation, who disposes of the same for his own use with intent to defraud, is guilty of embezzlement. Ibid. 250.

In Michigan, apprentices and other persons under the age of sixteen years are excepted from the statute. Rev. Stat. (1872), 2084.

Proof of a continuous series of conversions of money by an officer to the use of another, in pursuance of a conspiracy between them, will support a verdict of the jury finding the aggregate sum as the amount of a single embezzlement. Brown *v.* State, 18 Ohio St. 496.

Unless there is such relation of employment as the statute describes, there can be no embezzlement. Hence, where a woman allowed a man to take bank bills for the purpose of counting them in her presence, and taking therefrom a small sum, which she consented to lend him, and, instead of returning any portion, he walked away with the whole, there was no embezzlement. Commonwealth *v.* O'Malley, 97 Mass. 584.

There must be a fraudulent intent. Hence, where a clerk, whose business it was to receive, keep, and disburse the money of a firm, being about to leave, took from the money in his hands the amount due him for his salary, without the knowledge or consent of the firm, and charged the same to himself on the books, there was no embezzlement. Ross *v.* Innis, 35 Ill. 487. There must be a fraudulent intent contemporaneous with a conversion. Hence, where

an officer of a bank took money from a depositor, without any fraudulent intent to convert it to his own use, and entered it properly in the books of the bank, and he five days afterward altered the entries to conceal the fact that he had received this sum, in order thereby to cover up some previous deficit occasioned by former fraudulent acts, there was no embezzlement of such deposit. Commonwealth *v.* Shepard, 1 Allen, 575. But if the treasurer of a railroad company draws from bank by his check, as treasurer, money which he has on deposit in that capacity, and fraudulently converts to his own use the money so drawn, he is guilty of embezzlement, although he did not intend to convert the money at the time he drew it, and although, at the time he converted it, he intended to make it good, and had the means of doing so. Commonwealth *v.* Tuckerman, 10 Gray, 173. For if an act of embezzlement is committed, it is not purged by a subsequent restitution of the money or property appropriated. Hence, a person who received a note for the purpose of getting it discounted for another at a bank, and sent it with other notes of his own to the bank to be discounted on his own account, and had the proceeds entered to his own credit, he was guilty of embezzlement as soon as the note was delivered to the cashier to be thus misused; and a subsequent payment of the money on account of the owner of the note did not purge the crime. Commonwealth *v.* Butterick, 100 Mass. 1.

CHAPTER III.

FALSE PRETENSES.

It is difficult to correctly define the offense of obtaining property by false pretenses. In some cases, on the one hand, there seems little to distinguish it from larceny; and in others, to distinguish it from a mere non-criminal lie. The most intelligible distinction between false pretenses and larceny has been thus set forth:(*n*) "In larceny, the owner of the thing stolen has no intention to part with his property therein to the person taking it, although he may intend to part with the possession; in false pretenses, the owner does intend to part with his property in the money or chattel, but it is obtained from him by fraud." [A person who by fraud obtains a loan of money, there being no understanding that he is to return the same bills or coins, is guilty, not of larceny, but of false pretenses.(1)] The line between the two crimes is very narrow. Thus, A. intrusts B. with a parcel to carry to C. D. meets B. and alleges that he is C., whereupon B. gives him the parcel. It will be larceny if B. had not authority to pass the property; false pretenses if he had.(*o*) The difficulty of discriminating arises chiefly where there has been a constructive taking only, where the owner delivers the property, though the possession is obtained by fraud. The evil which might arise from this state of things is to some extent obviated by a provision that if upon an indictment for false pretenses it is proved that the defendant obtained the property in such manner as to amount in law to larceny, he is not on that account to be acquitted.(*p*) Therefore, in cases of doubt, it is better to indict for false pretenses.

(*n*) Arch. 362; v. White *v.* Garden, 10 C. B. 927.
(*o*) v. R. *v.* Watkins, 1 Leach, 520. (*p*) 24 and 25 Vict., c. 96, § 88
(1) Kellogg *v.* State, 26 Ohio St. 15.

The points to be proved on an indictment for false pretenses are the following:

i. The pretense and its falsity.

ii. That the property or some part thereof was obtained by means of the pretense.

iii. The intent to defraud.

i. The pretense must be wholly or in part of an *existing fact*;(q) for example, a false statement of one's name and circumstances in a begging letter. But a mere exaggeration will not suffice, as if a person actually in business pretends that he is doing a very good business;(r) otherwise, if he were not doing any business at all.(s) The fact must be an *existing* fact; therefore it is not within the act for a person to pretend that he will do something which he does not mean to do.(t) But a promise to do a thing may involve a false pretense that the promisor has the power to do that thing; and for this an indictment will lie.(u) [One who obtains goods by falsely and fraudulently promising that if the same be delivered to him he will sell them and pay over the proceeds, and who fails, after selling, to pay over the proceeds, is not guilty of obtaining goods under false pretenses.(1) But where the proprietor of an intelligence office agreed to procure a place for an applicant in consideration of two dollars paid in advance, and falsely stated that he had a situation in view, he was guilty of obtaining money under false pretenses.(2)]

Obtaining additional money by stating that a larger amount of goods is delivered than is known to be the case, is within the statute.(x) But of course not every breach of

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(q) "It may be laid down as a general rule of interpretation of the statute, that wherever a person fraudulently represents, as an *existing fact*, that which is not an existing fact, and so gets money, etc., that is an offense within the act."—Arch. 497.

(r) R. v. Williamson, 11 Cox, 328. (s) R. v. Crabb, 11 Cox, 85.

(t) R. v. Lee, 9 Cox, 304.

(u) R. v. Giles, 34 L. J. (M. C.) 50.

(x) R. v. Ragg, 29 L. J. (M. C.) 86.

(1) Glacken v. Commonwealth, 3 Metc. (Ky.) 233.

(2) Commonwealth v. Parker, Thach. Crim. Cas. 124.

warranty or false assertion at the time of a bargain will be treated as a false pretense;(*y*) for example, if, in selling an article for a lump sum, the vendor makes a false representation as to the weight in order to induce the purchaser to conclude the bargain.(*z*) However, it seems clear that a false representation respecting an alleged matter of definite fact knowingly made is a false pretense within the statute; even although the representation is merely as to the quality of the goods sold; as when the prosecutor was induced to purchase a chain on the representation that it was fifteen carat gold, whereas it was only six carat.(*a*) But if the representation is only what is matter of opinion, and amounts merely to exaggerated praise, the party is not criminally liable; as where the defendant said his spoons were equal to Elkington's.(*b*)

[It has been held that the pretenses must be such that a person of ordinary caution would give credit to them. State *v.* Magee, 11 Ind. 154; Leobold *v.* State, 33 Ind. 484; Commonwealth *v.* Grady, 13 Bush, 285; State *v.* Evers, 49 Mo. 542. But some regard must be had to the capacity of the person defrauded, as the capacity of a blind man to judge of a false pretense as to color. Cowen *v.* People, 14 Ill. 348. And to the circumstances of the case. It was held in England that a man who handed for change a bank-note for one pound, pretending it was a five pound note, could be convicted of obtaining money under false pretenses, though the person to whom it was handed could read. Regina *v.* Jessop, 7 Cox Crim. Cas. 399. And Mr. Bishop doubts the correctness of the rule altogether. 2 Bish. Crim. L. § 416.

Under the rule that the pretense must have induced the parting with the goods, it is well held in England that where a person by false pretenses obtained an agreement to furnish lodging and board, and under that agreement obtained articles of food, he could not be convicted of ob-

(*y*) R. *v.* Codrington, 1 C. & P. 661.
(*z*) R. *v.* Ridgeway, 3 F. & F. 838.
(*a*) R. *v.* Astley, L. R., 1 C. C. R. 301; 40 L. J. (M. C.) 85.
(*b*) R. *v.* Bryan, 26 L. J. (M. C.) 84.

taining those articles of food by false pretenses. Regina *v.* Gardner, 7 Cox Crim. Cas. 136.

If the goods would not have been obtained but for the false pretenses, though other circumstances contributed to induce the owner to part with them, the person making such pretenses can be convicted. People *v.* Haynes, 14 Wend. 546; State *v.* Thacher, 35 N. J. Law, 445.

Obtaining merely what is his own, or what is justly due, though by false pretense, does not come within the crime. Commonwealth *v.* McDuffy, Supreme Court Mass., Jan. '79, and cases cited; Central Law J., 16th May, '79.]

The false pretense need not be expressed in words; it will suffice if the pretense is signified in the conduct and acts of the party; for example, by obtaining goods upon giving in payment a check upon a banker with whom the defendant has no account, he believing that it would not be paid on presentation;(*c*) or by a person, who was not a member of the university, obtaining goods fraudulently at Oxford through wearing a commoner's cap and gown.(*d*) A false pretense made through an innocent agent is, of course, the same as if made by the defendant himself.

If the goods are obtained by means of a forged order, note, or other document, the party should be indicted for forgery, seeing that the punishment for that offense is much more severe. But the prisoner will not be acquitted for the false pretense on the ground that he might have been indicted for forgery.(*e*)

It will suffice if the falsity of the substance of the pretense is proved, although every particular is not established.(*f*)

ii. *The intent to defraud.*

As in other cases, the intent is generally to be gathered from the facts of the case. It is sufficient to allege in the indictment, and to prove at the trial, an intent to defraud

(*c*) R. *v.* Jackson, 3 Camp. 370; v. R. *v.* Hazelton, L. R., 2 C. C. R. 134; 44 L. J. (M. C.) 11.

(*d*) R. *v.* Barnard, 7 C. & P. 784. (*e*) 14 and 15 Viet., c. 100. § 12

(*f*) R *v* Hill, R. & R. 190.

generally, without alleging or proving an intent to defraud any particular person.(*g*)

It has been held that, to support the evidence of intent to defraud, proof that the defendant has *subsequently* obtained other property from some other person by the same pretense is not admissible;(*h*) but that evidence of similar false pretense on a *prior* occasion is admissible.(*i*)

Obtaining property by false pretenses is a misdemeanor, punishable by penal servitude to the extent of five years.(*k*) It is subject to the provisions of the vexatious indictments act.(*l*) As we have seen, the defendant is not entitled to be acquitted for the misdemeanor because the facts show that the offense amounts to larceny; but no person tried for such misdemeanor is liable to be afterward prosecuted for larceny upon the same facts.(*m*)

[This crime is a felony in Kentucky. Rev. Stat. (1877), 338. And Indiana. Rev. Stat. (1876), 436. In Ohio, if the value of the goods obtained is thirty-five dollars or more, the offense is felony; otherwise, it is a misdemeanor. 74 Ohio L. 289. It is punishable, in Iowa, by imprisonment in the penitentiary not exceeding seven years, or in the county jail not exceeding one year. Rev. Stat. (1873), 636. And, in Michigan, by imprisonment in the penitentiary not exceeding ten years, or in the county jail not more than one year. Rev. Stat. (1871), 2087.]

Winning at play by fraud is punishable as for obtaining money by false pretenses.(*n*)

Closely allied to the offense of false pretenses is that of *inducing persons by fraud to execute valuable securities.* For any person, with intent to defraud or injure another, by any false pretense to fraudulently cause or induce any person to execute, make, accept, indorse, or destroy the whole or any part of any *valuable security;* or (b) to write, impress, or or affix his name, or the name of any other person, or of

(*g*) 24 and 25 Vict., c. 96, § 88. (*h*) R. *v.* Holt, 30 L. J. (M. C.) 11.
(*i*) R. v. Francis, L. R., 2 C. C. R. 128; 43 L. J. (M. C.) 97.
(*k*) 24 and 25 Vict., c. 96, § 88. (*l*) v. p. 268.
(*m*) 24 and 25 Vict., c. 96, § 88; v. R. *v.* Bulmer, 33 L. J. (M. C.) 171
(*n*) 8 and 9 Vict., c. 109, § 17.

any company, firm, or copartnership, or the seal of any body corporate, company, or society, upon any paper or parchment, in order that the same may be afterward made, or converted into, or used, or dealt with as a valuable security, is a misdemeanor, punishable as obtaining by false pretenses.(*o*)

FALSE PERSONATION.

The obtaining goods, money, or other advantage, by false personation, is a crime similar to false pretenses. At common law, false personation is punishable as a cheat or fraud; but certain particular cases are dealt with by statute. This crime is also closely connected with forgery; and many statutes providing against forgery at the same time provide against false personation.

Of *seamen, soldiers, etc.*—For a person, in order to receive any pay, wages, prize-money, etc., payable, or supposed to be payable, or any effects or money in charge, or supposed to be in charge, of the admiralty, falsely and deceitfully to personate any person entitled, or supposed to be entitled, to receive the same, is a misdemeanor, punishable by penal servitude to the extent of five years, or, on summary conviction, by imprisonment not exceeding six months.(*p*)

To knowingly and willfully personate, or falsely assume the name or character of, or to procure others to personate, etc., a soldier or other person who shall have really served, or be supposed to have served, in her majesty's army or in any other military service, or his representatives, in order to receive his wages, prize-money, etc., due or payable, or supposed to be due or payable, for service performed, or supposed to be performed, is a felony, punishable by penal servitude to the extent of life.(*q*) It is no defense to an indictment, under section 49, that the person was authorized to personate the soldier; or that he had bought from him the prize-money to which the latter was entitled.(*r*)

(*o*) 24 and 25 Vict., c. 96, § 90.
(*p*) 28 and 29 Vict., c. 124, § 8; v. § 9.
(*q*) 2 and 3 Wm. 4, c. 53, § 49; 7 Geo. 4, c. 16, § 38.
(*r*) R. *v.* Lake, 11 Cox, 333.

Owners of stock, etc.—To falsely and deceitfully personate the owner of any share or interest in any stock, annuity, or public fund, which is transferable at the bank of England or Bank of Ireland; or (b) the owner of any share or interest in any capital stock of any body corporate, company, or society established by charter or act of parliament; or (c) the owner of any dividend or money payable in respect of any such share or interest, and thereby to transfer, or endeavor to transfer, any such share or interest, or receive, or endeavor to receive, any money so due, as if the offender were the true and lawful owner, is a felony, punishable by penal servitude to the extent of life.(*s*)

To obtain property in general.—By the false personation act, 1874, it is provided that, for any person to falsely and deceitfully personate any person, or the heir, executor, or administrator, wife, widow, next of kin, or relation of any person, with intent fraudulently to obtain any land, chattel, money, valuable security, or property, is a felony, punishable by penal servitude to the extent of life.(*t*)

Bail.—Without lawful authority or excuse (which it lies on the accused to prove), in the name of another person to acknowledge any recognizance or bail, or any *cognovit actionem*, or judgment, or any deed or other instrument, before any court, judge, or other person lawfully authorized in that behalf, is a felony, punishable by penal servitude to the extent of seven years.(*u*)

CHEATING.

Cheating is a comprehensive term, including, in its wider signification, false pretenses, false personation, and other crimes which are specially provided for. A cheat, at com-

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(*s*) 24 and 25 Vict., c. 98, § 3: v. also national debt act, 1870 (33 and 34 Vict., c. 58, § 4); India stock (26 and 27 Vict., c. 73, § 14); companies act, 1867 (30 and 31 Vict., c. 131, § 35).

(*t*) 37 and 38 Vict., c. 36, § 1; v. also § 2.

(*u*) 24 and 25 Vict., c. 98, § 34. Voters at elections, parliamentary and municipal, 35 and 36 Vict., cc. 33, 60; 5 and 6 Wm. 4, c. 76; 6 and 7 Vict., c 18.

mon law, is the fradulent obtaining the property of another by any deceitful and illegal practice or token which *affects* or *may affect the public.*(x) Thus, the leading characteristic of such a cheat is the publicity of its effects. Therefore, a cheat or fraud effected by an unfair dealing and imposition on an individual is not the subject of an indictment at common law. Of course many acts of cheating are not punishable at all by the criminal law; the person wronged being left to his remedy by civil action.

The chief classes of offenses regarded as cheats at common law are the following:

Against public justice, *e. g.*, counterfeiting a discharge.

Against public health, *e. g.*, selling unwholesome provisions.

Against public economy, *e. g.*, by using false weights or measures.

There must be a plausible contrivance, as in the last instance, against which common prudence could not have guarded. Thus, though selling by false weights or measures is a misdemeanor, selling under weight is merely actionable.

[Cheats indictable at common law were effected by the use of false weights or measures, by false personation, by mixing deleterious ingredients with food for public sale, or other visible false token or device. A cheat by a mere false affirmation, whether oral or written, was not indictable at common law. Pinckney's case, 2 East. P. C., c. 18, § 2; Rex *v.* Lewis, Sayer, 205 (also reported in 3 Burr. 1697); Regina *v.* Jones, 1 Salk. 379; Rex *v.* Bryan, 2 Str. 866. And a fictitious order for the payment of money was held to be a mere false affirmation. Rex *v.* Lara, 6 T. R. 565. As was marking on a cask a false statement of the number of gallons contained in it. Rex *v.* Wilkers, cited, 2 Burr. 1128. The crime of false pretense, obtaining goods by a mere false affirmation, oral or written, was created in 1757 by statute (30 Geo. 2, c. 24), and has been more fully defined by subsequent English and American statutes.]

(x) v. 2 Russ. 604.

Apart from the common-law crime, a great multitude of statutes are designed to restrain and punish particular deceits, or deceits in particular trades. Amongst the more general we may notice the laws preventing cheating by:

Counterfeit trade-marks.(*y*)

Fraudulent conveyances.(*z*)

The general punishment for this misdemeanor is fine or imprisonment, or both.

(*y*) v. p. 105.

(*z*) 13 Eliz., c. 5; 27 Eliz., c. 4. For other common law cheats, v. 2 Russ. 604, *et seq.*

CHAPTER IV.

BURGLARY, ETC.

THE offense of burglary (in the strict signification of the term) is thus defined at common law: The breaking and entering of the dwelling or mansion-house of another in the night time, with intent to commit a felony.(*a*) The limits of burglary proper have been extended; and the punishment of other crimes closely connected with burglary has been also separately provided for by statute. The crime is thus described in the larceny act: "Whosoever shall enter the dwelling-house of another, with intent to commit any felony therein, or being in such dwelling-house shall commit any felony therein, and shall in either case break out of the said dwelling-house in the night, shall be deemed guilty of burglary."(*b*)

[The statutes of Kentucky do not define burglary, but only declare the punishment. Hence the common-law definition prevails. The statute of Ohio, with the interpretation given by the courts to its words, includes not merely dwelling-house, but almost every sort of erection, as well as watercraft and railroad cars. 74 Ohio L. 248. "Barn" includes a building erected and used on a farm for drying and storing tobacco. Ratekin *v.* State, 26 Ohio St. 420 "Factory" includes an inclosed building used for depositing ashes therein and converting the same into potash.

(*a*) 3 Inst. 63.

(*b*) 24 and 25 Vict., c. 96, § 51. "This is an excellent instance of the way in which, by the combined operation of common and statute law, definitions are made, as it were, to stand on their heads. The common law being a very rude system, involving great severity of punishment, affixed special names to complications of crimes. The statute law took up the complicated definition as the starting point, and inserted minor offenses to fill up the gap left by the common law."—Fitz. St. 139.

Blackford v. State, 11 Ohio St. 327. "Store-house" includes a room occupied as a news depot. Barr *v.* State, 25 Ohio St. 70. The name by which the structure must be described in the indictment is not the original designation of the structure when it was erected, or by which it may still be known, but must denote its substantial character as fixed by the use to which it is appropriated at the time of the breaking and entering. Thalls *v.* State, 21 Ohio St. 233. It is a felony to maliciously and forcibly break and enter in the night, with intent to commit a felony, or to steal any value, or to maliciously enter either day or night, with intent to commit a felony.

The Indiana statute names "mansion-house, store-house, manufactory, office, shop, out-house, or boat." 2 Rev. Stat. (1876), 431. The Illinois statute includes all buildings, railroad cars, watercraft, or wharf-boats; and also includes "willfully and maliciously, without force (the doors or windows being open), entering, etc. Rev. Stat. (1877), 354. In Michigan, it is a felony, with various degrees of punishment, (1) to break and enter a dwelling-house in the night time, with intent to commit a felony therein, or having entered with such intent, to then break such dwelling-house, any person being lawfully therein, the offender being armed with a dangerous weapon, or so arming himself in such house, or making an actual assault on any person lawfully therein; (2) to so break and enter, the offender not being so armed, nor so arming himself, nor making such assault; (3) to break and enter in the night time, with such intent, any office, shop, store, railroad depot, warehouse, mill, school-house, or factory, not adjoining or occupied with a dwelling, or any vessel within the body of a county; (4) to enter in the night time, without breaking, or to break and enter in the day-time, with such intent, any structure, etc., named in the preceding sections, the owner or other person lawfully therein being put in fear; and (5) if the act be as described in (4), except that no person lawfully therein is put in fear, it may be punished as a felony, or as a misdemeanor. Rev. Stat. (1871), 2080, 2081.

In Iowa, it is burglary to break and enter a dwelling-house in the night time, with intent to commit a public offense; or having so entered, with such intent, to break such dwelling in the night. It is an aggravation of the crime if the offender be armed, or arm himself with a dangerous weapon, or actually assault a person lawfully therein, or have any confederate present, aiding and abetting. It is also felony to, with intent to commit any public offense, break and enter in the day-time, or enter without breaking in the night time, any dwelling-house, or at any time to break and enter any office, shop, store, warehouse, railroad car, boat, or vessel, or any buildings in which any goods, merchandise, or valuable things are kept for use, sale or deposit. Rev. Stat. (1873), 605.

In Ohio, it is a misdemeanor to maliciously break and enter in the day time, with intent to steal; or, in the night season, to unlawfully break open and enter any house or watercraft in which any person resides or dwells, and commits or attempts to commit personal violence, or is so armed with a dangerous weapon as to indicate such intention; or in the day-time to unlawfully break open and enter any such dwelling, and commit or attempt to commit any personal abuse. 74 Ohio L. 249.]

Four points present themselves for consideration: the time, place, manner, and intent.

i. *Time.*—Formerly great uncertainty existed as to what constituted *night*—whether it was the interval between sunset and sunrise, whether it included twilight, etc. The matter has been settled by statute. As far as regards burglary and other offenses treated of in the larceny act, the night is deemed to commence at nine o'clock in the evening, and to conclude at six o'clock on the following morning.(*c*)

Both the breaking and the entering must take place at night. If either be in the day-time, it is not burglary. But the breaking may take place on one night, and the entering on another, provided that the breaking is with intent

(*c*) 24 and 25 Vict., c. 96, § 1

to enter, and the entering is with intent to commit a felony.(*d*)

["For the purpose of this distinction, the night, in very ancient times, was deemed to begin with the setting and end with the rising of the sun; but the common-law rule now is, and for a long time has been, that those portions of the morning and evening in which, while the sun is below the horizon, sufficient of his light is above for the features of a man to be reasonably discerned, belong to the day. Light reflected from the moon is not to be taken into account; therefore, it is not always day when one's face may be seen. The law recognizes no middle space between day and night; but, when one begins, the other ends." 1 Bishop Crim. Law, § 293, where the authorities are cited. The same statement is given by Gabbett. 1 Crim. Law, 169.]

ii. *Place.*—It must be the dwelling-house of another. To constitute a *dwelling-house*, for the purposes of the statute dealing with burglary and similar offenses (the larceny act), the house must be either the place where one is in the habit of residing, or some building between which and the dwelling-house there is a communication, either immediate or by means of a covered and inclosed passage leading from the one to the other; the two buildings being occupied in the same right.(*e*) It must be the house of *another*; therefore, a person can not be indicted for a burglary in his own house, though he breaks and enters the room of his lodger, and steals his goods.

The decisions as to what places satisfy the requirements of burglary have been numerous, and, to some extent, conflicting. We may gather the following facts:

The building must be of a permanent character; therefore, a tent or booth will not suffice, although the owner lodge there. The tenement need not be a distinct building; thus, chambers in a college or inn of court, will suffice.

As to the nature of the *residence* which is necessary.—

(*d*) R. *v* Smith, R. & R. 417.

(*e*) R. *v.* Jenkins, R. & R. 224; 24 and 25 Vict., c. 96, § 53.

The temporary absence of the tenant is not material, if he has an intention of returning, though no one be in during the interval. It will suffice if any of the family reside in the house, even a servant,(*f*) unless the servant is there merely for the purpose of protecting the premise.(*g*) It seems that sleeping is necessary to constitute residence.(*h*)

In the case of hiring a part of a house, the part let off may be considered as the dwelling-house of the hirer, if the owner does not himself dwell in the house, or if he and the hirer enter by different doors; that, is, of course, provided that the hirer satisfies the other requirements of residence given above. If he does not, the place can not be the subject of burglary at all; it is not the dwelling-house of the lodger or tenant, because there is no residence; nor of the owner, because it is severed by the letting.(*i*) But, if the owner himself, or any of his family, lie in the house, and there is only one outward door at which they and the lodger enter, the lodger is regarded as an inmate, and, therefore, the house must be described as that of the owner.(*k*)

At common law, a church might be the subject of burglary; but this case is now specially provided for by statute.(*l*)

iii. *Manner.*—There must be both a breaking and an entering.

As to the *breaking.*—It must be of part of the house; therefore, it will not suffice, if only a gate admitting into the yard is broken. But the breaking is not restricted to the breaking of the outer walls, or doors, or windows; if the thief gains admission by the outer door or window being open, and afterward breaks or unlocks an inner door, for the purpose of plundering one of the rooms, it is burglary.(*m*) This will apply especially to the case of servants, lodgers, etc., who are lawfully in the house. Breaking

(*f*) R. *v.* Westwood, R. & R. 495.
(*g*) R *v.* Flannagan, R. & R. 187. (*h*) R. *v.* Martin, R. & R. 108.
(*i*) v. Arch. 523, 524, and cases quoted there.
(*k*) v. R. *v.* Rogers, 1 Leach. 89. (*l*) v. p. 211.
(*m*) R. *v.* Johnson, 2 East, P. C. 488.

chests or cupboards does not satisfy the requirements of burglary.

The breaking is either actual or constructive. *Actual*, when the offender, for the purpose of getting admission for any part of his body, or for a weapon or other instrument, in order to effect his felonious intention, breaks a hole in the wall of a house, breaks a door or window, picks the lock of a door, or opens it with a key, or even by lifting the latch, or unlooses any other fastenings to doors or windows which the owner has provided.(*n*) It is not burglary if the entry is made through an open window or door, or through an aperture (other than a chimney), provided that the thief does not break any inner door. Nor is raising a window which is already partly open; but it has been decided that the lifting the flap of a cellar which was kept down by its own weight was burglary.(*o*) [To push open a closed but unfastened transom, over the top of an outer door, is a breaking, although the transom has a button or catch for the purpose of fastening it.(1)]

The breaking is *constructive*, where admission is gained by some device, there being no actual breaking. As, for example, to knock at the door and then rush in under pretense of taking lodgings, and fall on and rob the landlord; or to procure a constable to gain admittance in order to search for traitors, and then to bind the constable and rob the house. These are breaches sufficient to constitute burglary, for the law will not suffer itself to be trifled with by such evasions.(*p*) So for servants to conspire with a robber, and let him into the house at night, is a burglary in both. To obtain admission to a house by coming down the chimney is sufficient, for the chimney is as much closed as the nature of things will admit; but getting through a hole in the roof left to admit light is not.(*q*)

As to the *entry*.—The least degree of entry with any part of the body, or with any instrument held in the hand, will

(*n*) 3 Inst. 64; 1 Hale, P. C. 552.
(*o*) R. *v.* Russell, 1 Mood. C. C. 377. (*p*) 4 Bl. 226.
(*q*) R. *v.* Brice, R. & R. 450.
(1) Timmons *v.* State, 34 Ohio St. 426.

suffice; for example, stepping over the threshold, putting a finger or hook in at the open window in order to abstract goods. [But it must be an instrument used for effecting the ulterior felony; for if the instrument used merely to effect the breaking should in that act penetrate through the door or window so as to project within, that would not be an entry. Hughes's case, 1 Hale, 555; Rex *v.* Rush & Ford Russ. & Ry. C. C. 341; Rex. *v.* Roberts, Car. Crim. L. (3d ed.) 293. To break the glass window and thrust the hand through it for the purpose of opening the inner shutter, is an entry. Rex *v.* Bailey, Russ. & Ry. C. C. 341. But to break an outside shutter and insert the hand through it to open the closed window, is not an entry. State *v.* McCall' 4 Ala. 643. The glass window in both cases was held to be the barrier. But if the glass window were open and the outside shutters or blinds were closed, then they would be the barrier. Commonwealth *v.* Stephenson, 8 Pick. 354.]

Though formerly there were doubts on the subject, it is now provided by statute that it is burglary for a person who has entered the dwelling-house of another with intent to commit a felony therein, or for a person who in such dwelling-house (*e. g.*, a servant) has committed a felony therein, to *break out.*(*r*)

When the breaking with intent to commit a felony is proved, but there is no proof of entry, the jury may convict the prisoner of an attempt to commit burglary.(*s*)

iv. The *intent.*—To constitute a burglary, there must be an intent to commit some felony in the dwelling-house, otherwise the breaking and entry will only amount to a trespass.(*t*) It must be either proved from evidence of the actual commission of the felony, or implied from some overt act if the felony is not actually carried out. For it is none the less burglary because the felony which is intended is not perpetrated. [Recent, unexplained possession of goods stolen at the time of the burglary is competent evidence to be submitted to the jury for the purpose of

(*r*) 24 and 25 Vict., c. 96, § 51.
(*s*) R. *v.* Spanner, 12 Cox, 561.
(*t*) 1 Hale, P. C. 561.

raising a presumption of fact that the person having such possession is guilty of burglary. Methard *v.* The State, 19 Ohio St. 363; Prince *v.* State, 44 Texas, 480.]

Burglary is a felony, punishable by penal servitude to the extent of life.(*u*)

Two or three crimes connected with the subject of burglary remain to be considered:

Entering a dwelling-house in the night, with intent to commit a felony—the offense differing from burglary, inasmuch as there is no breaking—is a felony, punishable by penal servitude to the extent of seven years.(*x*)

Being found by night armed with any dangerous or offensive weapon or instrument, with intent to break *or* enter into any dwelling-house, or *other building* whatsoever, and to commit a felony therein (N. B. An intent either to break or to enter will suffice, also that the offense is not confined to *dwelling-houses*. Proof must be given of an intent to break into or enter a particular building; proof of a general intent will not suffice); (*y*) or, being found by night in possession, without lawful excuse, of any *housebreaking implement*, or being found with the face blackened or otherwise disfigured, with intent to commit a felony; or, being found by night in any dwelling-house or other building with intent to commit a felony therein, is a misdemeanor, punishable by penal servitude to the extent of five years.(*z*) If any of the above misdemeanors be committed after a previous conviction for felony, the penal servitude is from seven to ten years; if after a previous conviction for one of such misdemeanors, the penal sertitude is from five to ten years.(*a*)

HOUSE-BREAKING.

The chief distinction between this crime and burglary is that the former may be committed by *day*, the latter by

(*u*) 24 and 25 Vict., c. 96, § 52. (*x*) Ibid., § 54.
(*y*) R. *v.* Jarrald, 32 L. J. (M. C.) 258.
(*z*) 24 and 25 Vict., c. 96, § 58.
(*a*) Ibid. § 59; 27 and 28 Vict., c. 47, § 2.

night only. There is also a difference to be noticed as to the structure which may be the subject of the crimes. House-breaking extends to school-houses, shops, warehouses, and counting-houses, as well as dwelling-houses, also any building within the *curtilage* of a dwelling-house and occupied therewith, but not being part thereof, according to the provision of section 53, noticed above.(*b*)

This crime consists in the breaking and entering any such house with the intention of committing a crime therein, or in the case of one being in such house, committing a felony therein, and breaking out of the same. The breaking and entering will be proved, as in burglary.

RECAPITULATION.

Inasmuch as there is great danger of confusion and considerable intricacy in the definitions, it will be well to recapitulate the distinctions between certain crimes partaking of the general character of fraud. A few general remarks on the class, as a whole, will be added.

First, as to *larceny* and *embezzlement*. The gist of the latter offense is that, in the case of appropriation by a servant or clerk of money or chattels received by him for his master or employer, such money or chattels are not, at the time of appropriation, in the actual or constructive possession of the master or employer; or, in other words, the prisoner intercepts the property on its way to the possession of the master or employer. In more than one direction does this crime very closely border on larceny. Thus difficult points may arise on the questions—whether the appropriator were a servant; whether the master was in possession of the property, etc. [Goods in the hands of a bailee are not in the possession of the owner, but are in possession of the bailee. Hence, a conversion of such goods by the bailee, he having originally obtained possession in good faith, can not be larceny, but may be embezzlement. But

(*b*) 24 and 25 Vict., c. 96, § 55; v. p. 206.

goods of the master, while in the hands of the servant, are in the possession of the master, and only in the custody of the servant. Hence a conversion of such goods, by the servant is larceny, not embezzlement. But goods which have not yet been in the possession of the master, are, when delivered to his servant, in the possession of the servant; and if the servant convert them before completion of the transit to the master's possession, such conversion is embezzlement, and not larceny.]

Between *larceny* and *false pretenses* the main distinction is, that in the former the *property* is not passed by the owner to the thief (and generally the possession is not intended to be passed); while in the latter, the property is passed to the defendant, but this is brought about by fraud. Here, again, subtle questions arise as to the authority to pass the property, etc.

[The occasion for a distinction exists only between false pretenses, and larceny by fraud. If by false pretense the owner is induced to part with his property in the goods, as well as his possession of them, the offense is obtaining goods by false pretenses. But if he is induced to part with possession only, but with the intent, on the part of him who makes the false pretense, of usurping the property in the goods also, the crime is larceny.]

The distinction of *robbery* from other kinds of larceny is, that in the former case there must have been a felonious taking from the *person*, or in the *presence* of another, accompanied either by *violence* or a *putting to fear*.

In *burglary* there is a limitation in certain respects not necessary in simple larceny: as to the *time*, viz., at night; as to the *place*, viz., a dwelling-house; as to the *manner*, viz., the breaking and entering, or breaking out. In one point burglary is wider in its scope—there need not be an actual larceny; it will suffice if there is an intent to commit a felony.

Between *burglary* and *house-breaking* the distinction is that the former must be committed at night, and is more limited with respect to the buildings which are its subjects.

Between *house-breaking* and *larceny in a dwelling-house*

there is the distinction as to the breaking, and also as to the building, as to which the latter crime is on the same footing as burglary.

Sir James Stephen(*o*) proposes a comprehensive definition of theft, to include not only all that usually now goes by the name of larceny, but also embezzlement, obtaining by false pretenses, and other "illegal and malicious transfers of any of the advantages, derived from property, from the person entitled to them to some other person;" thereby abolishing "five or six useless and intricate distinctions between cognate crimes," and doing away with "all the technicalities about the kinds of property which are the subjects of larceny, and with those which arise out of the obscure doctrine of possession."

The definition is: "To steal is unlawfully, and with intent to defraud, by taking, by embezzlement, by obtaining by false pretenses, or in any other manner whatever to appropriate to the use of any person any property whatever, real or personal, in possession or in action, so as to deprive any other person of the advantage of any beneficial interest at law, or in equity, which he may have therein."

This definition "would include a great variety of fraudulent breaches of trust, many of which are now unpunished, or are punished, if at all, by special enactments, the construction of which is doubtful." The chief points in which it differs from the existing law are two: (a) "It takes, as the test of criminality, an intention to defraud at the time of appropriation of the property, and not at the time of its asportation." It is obvious that the moment of appropriation is the really critical time. (b) "It views, as the subject-matter of larceny, the beneficial interest of the proprietor, and not his specific right of possessing a specific thing." Thus the temporary use of an article would be as much the subject of larceny, if obtained with the intent to defraud, as the absolute permanent deprivation.

(*o*) Gen. View of Crim. Law, 129.

CHAPTER V.

FORGERY.

FORGERY may be described, in general terms, as the false making (or alteration) of an instrument (or part thereof) which purports on the face of it to be good and valid for the purposes for which it was created, with a design to defraud.(*p*)

The statute law on this subject is chiefly contained in one of the consolidated acts of 1861—the forgery and false personation act.(*q*) These laws are not careful to bring themselves within the compass of any definition; and they frequently deal with offenses which do not strictly fall under the principal heading. Thus, in the forgery act, we shall find noticed many offenses which, "though not amounting to forgery, facilitate, or are steps toward, the commission of that crime, or are of a somewhat similar nature."

It may be premised that forgery is very closely allied to obtaining by false pretenses.(*r*) Indeed, "if there were no special provisions on the subject, many cases of forgery would be punishable as cases of obtaining money by false pretenses."(*s*) It is needless to say that forgery is treated as a much more serious crime than false pretenses.

We shall, in the first place, notice with what instruments the statute deals, and what are left to the punishment at common law; and then examine the nature of the crimes which may be committed with regard to these instruments.

The statute is a model of excessive and needless intricacy. It consists of fifty-six sections, of which about half are merely enumerations of particular classes of instruments

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(*p*) v. 2 East, P. C. 991; 4 Bl. 247.

(*q*) 24 and 25 Vict., c. 98. When merely a section is quoted in this chapter it must be understood to be a section of this statute.

(*r*) v. p. 197. (*s*) Fits. St. 141.

which it is felony to forge. Inasmuch as in almost every case the punishment is the same, "the greater part of the law is perfectly needless, and might be condensed into one section, as follows: 'Whosoever maliciously, and for the purpose of fraud or deceit, shall forge any thing written, printed, or otherwise made capable of being read, or utter any such forged thing, knowing the same to be forged, shall, upon conviction, be senteneed to penal servitude for life, or for any term not less than three(*t*) years, or to imprisonment, with or without hard labor, for any term not exceeding two years.'"(*u*)

[In Ohio, it is felony to, with intent to defraud, falsely make, alter, forge, counterfeit, print, or photograph any of a numerous list including perhaps every writing that can be basis or evidence of an enforcible right, or any draft or survey of land; or knowingly utter or publish such when so made; or use or attempt to use in any way any paper purporting to be of an official character and to be signed by the governor by stamp or press.

It is a misdemeanor to counterfeit, forge, or alter, etc., any ticket, coupon, or pass, whether printed, written, lithographed, or engraved for passage on any railroad or toll bridge, or knowingly to have such in possession or to utter the same; also to obliterate the punch marks or other cancellation of any such ticket or pass that has been canceled with intent to dispose of the same or to defraud, or knowingly utter any such having the cancellation obliterated; or for a conductor or toll-keeper to fail to cancel tickets, etc., after taking them up; or to maliciously alter, deface, mutilate, destroy, abstract or conceal any public record, or to forge or counterfeit any wrapper, label or trade-mark. 74 Ohio L. 290–294.

In Kentucky, besides special provisions making it felony to forge or counterfeit, any public security, the official seal of the United States or of any of the States, or of any public officer of any of them, or the stamp, brand, or certificate of any inspecting officer, or any of a list of private

(*t*) Now five. (*u*) Fitz. St. 142.

writings, there is a general provision making it felony to forge or counterfeit any writing whatever, whereby fraudulently to obtain the possession of or to deprive another of, any money or property, or cause him to be injured in his estate or lawful rights, or to utter and publish such instrument, knowing it to be forged and counterfeited. Rev. Stat. (1877), 330–332.

In Indiana, forgery is a felony, and embraces the forging of any of an enumerated list of writings public and private, "or any other instrument in writing, or any lawful brand on a tobacco, beef, bacon or pork cask, or lard keg or barrel, salt barrel or hay-bale," or knowingly uttering or publishing the same with intent to defraud any person or any body politic or corporate, or forging or counterfeiting any gold or silver coin current in the state, or uttering such counterfeit coin or any forged or counterfeit bank-note, bill, or other treasury note with intent to defraud any person; also for any justice of the peace to affix his name to any blank form of affidavit or certificate of acknowledgment, deliver the same to be filled up and used, and for any person to fill and use the same. 2 Rev. Stat. (1876), 439–442. And it is a misdemeanor to forge or counterfeit any wrapper or label or stamp used by a mechanic or manufacturer to his products, with intent to defraud either a purchaser, or the manufacturer or mechanic. Ib. 486.

In Illinois, it is felony to forge or counterfeit any of a long list of enumerated writings, instruments, tickets, and passes, public and private, or any other written instrument of another, or purporting to be such, by which any pecuniary demand or obligation, or any right in any property, is, or purports to be, created, increased, conveyed, transferred, diminished, or destroyed; or to counterfeit the handwriting of such another, with intent to defraud any person, body politic or corporate, whether resident in the state or elsewhere; or to make, forge, or counterfeit, or utter, or receive or have in possession to utter, when so forged or counterfeited, any public security issued, or purporting to be issued, by the United States, or by any state or territory or bank; or to utter, or have in possession with

intent to utter, any fictitious bill, note, or check; or to fraudulently connect together different parts of several genuine instruments, so as to produce one additional note or instrument, with intent to pass all as genuine. Rev. Stats. (1877), 364, 365.

In Iowa, the crime is substantially the same as in Illinois, except that the intent is, in general, "to defraud," as in Ohio. Rev. Stat. (1873), 609–612. It is also forgery to counterfeit the brand or mark of a public inspector of shingles or lumber. Ib. 377. This is in addition to the general provision (p. 612), making it forgery to counterfeit any stamp or brand authorized by law.

The statute of Michigan has no general clause, "or any other instrument or writing;" and, the act being passed in 1846, and amended in 1849, the list of instruments which may be the subject of forgery does not specify the treasury notes or other obligations of the United States, or of any state other than Michigan. It does specify, "any bank bill or promissory note, payable to the bearer thereof, or to the order of any person, issued by any incorporated banking company in this state, or in any of the British Provinces of North America, or in any other state or country, or payable therein, at the office of any banking company incorporated by any law of the United States or of any other state." Fraudulently affixing a fictitious signature to an instrument purporting to be made by a corporation, with intent to pass it as true, though no such person may have ever been officer or agent of such corporation, or have ever existed; also, connecting together fragments of several genuine instruments, so as to produce an additional instrument, with intent to pass them all as genuine, is forgery. It is sufficient, in an indictment, to allege, in general, an intent to defraud, without naming any person; and it shall be sufficient to prove an intent to defraud the United States, or any state, county, city, or township, or any public officer, or copartnership, or person.

Forging, or knowingly uttering what is forged, or knowingly having in possession, with intent to utter, two or more similar false or counterfeit notes or bills, is punished

either by confinement in the state prison or in the county jail.]

So much for forgeries provided against by particular statutes. Forgery at common law is a misdemeanor, punishable by fine or imprisonment, or both. It is only in virtue of the particular statute that any forgery is made a felony; the facility with which certain forgeries can be perpetrated, and the dangerousness of their tendency, necessitating this course. Cases of forgery which have not been specially dealt with by statute are nevertheless crimes, and left to their punishment at common law; for example, forging a testimonial to character in order to obtain an appointment.(*e*)

In viewing the crime generally, we shall have to treat of two classes of acts, each entailing the same consequences, and both usually appearing in different counts of the same indictment.

i. The actual forgery.

ii. The knowingly uttering the forged instrument.

i. The *forgery*.—As to the *instrument* itself. It must have some apparent validity, that is, it must purport on the face of it to be good and valid for the purpose for which it is created. So that a bill of exchange which, for want of signature, is incomplete, can not be the subject of forgery, because the defect is on the face of the instrument.(*f*) But there need not be an exact resemblance; it will be sufficient if it is capable of deceiving persons of ordinary observation.(*g*) The forgery must be of some document or writing; therefore the painting an artist's name in the corner of a picture, in order to pass it off as an original picture by that artist, is not forgery.(*h*) [It is not indictable to forge a letter of introduction "to any railroad superintendent," bespeaking courtesies to the bearer,(1) or a will

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(*e*) R. *v.* Sharman, 23 L. J. (M. C.) 51.

(*f*) R. *v.* Pateman, R. & R. 455.

(*g*) R. *v.* Collicott, R. & R. 212; [Commonwealth *v.* Stephenson, 11 Cush. 481; Wilkinson *v.* State, 10 Ind. 372.]

(*h*) R. *v.* Closs, 27 L. J. (M. C.) 54.

(1) Waterman *v.* People, 67 Ill. 91.

attested by a less number of persons than the law requires.(1) But the mere prohibition of the circulation of foreign bank bills does not prevent the counterfeiting them from being forgery.(2) But where such circulating of them is made a crime, then the counterfeiting of them is not forgery.(3) It is forgery to falsely make bank bills of a denomination which the bank has never issued, if the bank has authority to issue such.(4) A paper that does not show on its face that it has validity may be shown by innuendo, or averment of extrinsic circumstances, to have validity. But in such case, if the extrinsic circumstances are not averred in the indictment, there is no sufficient charge of a forgery, and judgment would be arrested after verdict against the defendant.(5)]

As to what *fabrication* will constitute a forgery.—It need not be of the whole instrument. Very frequently the only false statement is the use of a name to which the defendant is not entitled. It does not matter whether the name wrongly applied be a real or a fictitious one.(*i*) And a person may be guilty of forgery by making a false deed in *his own* name, as when a person has made a conveyance in fee of land to A., and afterward makes a lease for 999 years of the same land to B. of a date prior to that of the conveyance to A., for the purpose of defrauding A., the latter deed is a forgery.(*k*) Even to make a mark in the name of another person, with intent to defraud that person, is forgery.(*l*) Of course, the forgery need not be in the name; it may equally be in some other part of the instrument. For example, it is forgery to fill in without authority a form of check already signed, with blanks left for the insertion of

(*i*) R. *v.* Lockett, 1 Leach, 94.

(*k*) R. *v.* Ritson, L. R., 1 C. C. R. 200; 39 L. J. (M. C.) 10.

(*l*) R. *v.* Dunn, 1 Leach, 57.

(1) State *v.* Smith, 8 Yerg. 150.

(2) Thompson *v.* State, 9 Ohio St. 354.

(3) Guchins *v.* People, 21 Ill. 642.

(4) State *v.* Fitzsimmons, 30 Mo. 236; Trice *v.* State, 2 Head, 591.

(5) Commonwealth *v.* Ray, 3 Gray, 441; People *v.* Shall, 9 Cow. 778; Carberry *v.* State, 11 Ohio St. 410; State *v.* Humphreys, 10 Humph 442; Rembert *v.* State, 53 Ala. 467.

the sum.(*m*) [Or to alter the date of an accepted bill, so as to show an earlier day of payment;(1) or to put an address to the name of a drawee of a bill of exchange with intent to make the acceptance appear to be that of a different person;(2) or to tear off a condition whereby a non-negotiable instrument is made negotiable.(3) But the alteration must be material. Hence it is not forgery to falsely affix the name of a witness to a paper which the law does not require to be attested;(4) nor to add to an instrument words which the law would supply.(5)]

Not only a fabrication, but even an *alteration*, however slight, if material, will constitute a forgery; for example, making a lease of the manor of *Dale* appear to be a lease of the manor of *Sale* by changing the D to S;(*n*) making a bill of exchange for £8 appear to be for £80 by adding a cipher.(*o*) [But the destruction of an entire instrument is not a forgery. Hence the obliteration of a release indorsed on a bond was held not to be a forgery.(6)]

It must be proved that the alleged forgery was intended to represent the handwriting of the person whose handwriting it appears to be and is proved not to be, or that of a person who never existed. How is it to be proved that it is not the handwriting of the person of whom it purports to be? The most natural evidence is the denial of such person on his being produced as a witness. Even before the change in the law, which made interested parties competent witnesses, it was allowable to call as a witness the party whose writing had been forged.(*p*) Whether he be or be not called as a witness, the handwriting may be proved not to be his by any person acquainted with his handwriting, either from having seen him write, or from being in the habit of corresponding with him.(*q*) It

(*m*) Flower *v.* Shaw, 2 C. & K. 703. (*n*) 1 Hawk., c. 70, § 2.
(*o*) R. *v.* Elsworth, 2 East, P. C. 986. (*p*) 9 Geo. 4, c. 32.
(*q*) v. p. 381.
(1) Master *v.* Miller, 4 D. & E. 320.
(2) Reg. *v.* Blenkinsop, 2 Car. & K. 531.
(3) State *v.* Stratton, 27 Iowa, 420. (4) State *v.* Gherkin, 7 Ire. 206
(5) Hunt *v.* Adams, 6 Mass. 519.
(6) State *v.* Thornbury, 6 Ire. 79.

is also proved by statute that comparison of a disputed writing with *any* writing proved to the satisfaction of the judge to be genuine, may be made by witnesses; and that such writings and the evidence of witnesses concerning the same may be submitted to the court and jury as evidence of the genuineness, or otherwise, of the writing in dispute.(*r*) It appears not to be settled whether an expert may give evidence as to whether the writing is in a feigned hand from its appearance.(*s*) It is sufficient to disprove the handwriting of a person, and he need not be called to disprove an authority to others to use his name; circumstances showing guilty knowledge are enough.(*t*)

As to the *intent* to defraud.—It is not necessary to prove an intent to defraud any particular person; it will suffice to prove generally an intent to defraud.(*u*) So it need not appear that the prisoner had any intention ultimately to defraud the person whose signature he had forged, he having defrauded the person to whom he uttered the instrument.(*x*) But it is not necessary that any person should be actually defrauded, or that any person should be in a situation to be defrauded by the act.(*y*) [The intent to defraud is an intent that the false instrument shall be taken as genuine. Hence the criminal intent exists, though he who utters a false note or bill intends himself to protect it or take it up at maturity;(1) or although he agrees, while uttering the paper, to take it back if it proves not to be genuine;(2) or in case of manufacturing a deposition, he believes the statements therein to be substantially true, and he believes he should obtain the judgment sought.(3) Unless statute otherwise provides, the indictment must aver an intent to defraud some designated person.]

(*r*) 28 Vict., c. 18, § 8. (*s*) See cases in Arch. 593; Rosc. 175.

(*t*) R. *v.* Hurley, 2 M. & Rob. 473.

(*u*) § 44. (*x*) R. *v.* Trenfield, 1 F. & F. 43.

(*y*) R. *v.* Nash, 21 L. J. (M. C.) 147; [State *v.* Pierce, 8 Iowa, 231; Henderson *v.* State, 14 Texas, 503.]

(1) Reg. *v.* Forbes, 7 C. & P. 224; Reg. *v.* Beard, 8 C. & P. 143; Reg *v.* Geach, 9 C. & P. 499.

(2) Perdue *v.* State, 2 Humph. 494.

(3) State *v.* Kimball, 50 Maine, 409.

ii. The *uttering*.—In an indictment for forgery it is usual to add a second count, charging the prisoner with knowingly uttering the forged instrument. So that if the prosecution fail to prove the actual forgery, the prisoner may be convicted of the uttering.

The words of the consolidation act, which deals with all instruments in ordinary use, are, "offer, utter, dispose of, and put off." Therefore, in cases falling within that statute, it will suffice if there be a tender, or attempt to pass off the instrument; there need not be an acceptance by the other. Where such acceptance is requisite in order to constitute the crime, there must be other words describing the offense, such as "*pay*, and put off."(*z*)

It is an uttering if the forged instrument is used in any way so as to get money or credit by it, or by means of it, though it is produced to the other party, not for his acceptance, but for some other purpose; for example, for inspection, as where the prisoner placed a forged receipt for poor rates in the hands of the prosecution, for the purpose of inspection only, in order, by representing himself as a person who had paid his poor rates, fraudulently to induce the other to advance money to a third person.(*a*) It is immaterial that the uttering was only conditional. [At common law, in the absence of statute, it was an indictable offense to receive forged paper with intent to fraudulently utter it; but merely to have possession of such paper with such intent, was not indictable. The offense of uttering is not complete till the false writing passes into the hands or possession of some person other than the wrong-doer, his agent or servant.(1) But it need not be accepted as genuine; hence the uttering was complete where a forged draft was presented for payment, and payment was refused and the draft returned to the presentor.(2) The indictment must set out exactly the forged instrument and must aver that the instrument is so set out. It is sufficient if the indictment avers that the indictment is "of the following," or

(*z*) v. Arch. 598. (*a*) R. v. Ion, 21 L. J. (M. C.) 166.

(1) People v. Rathburn, 21 Wend. 509.

(2) People v. Brigham, 2 Mich. 550.

"in the following words and figures;" but the indictment will be bad on demurrer if it only aver the instrument is of "the purport following."(1) But by statute in Ohio, it is sufficient to set out the purport. 74 Ohio L. 335. Where the forged note as set out by its tenor in the indictment is signed Otha $\overset{\text{his}}{\times}$ Carr, it would be error to admit in evidence a note signed Oatha $\overset{\text{mark}}{\times}$ Carr.(2)]

Of course the forged character of the instrument, and the intent to defraud, must be proved, as on the first count for the forgery. It will be also necessary to prove that the defendant *knew* the instrument to be forged. This point is not capable of direct proof, but will be presumed from the facts of the case; for example, on its appearing that the prisoner had in his possession other forged notes of the same kind. To prove the *scienter* or guilty knowledge, evidence may be given that the defendant has passed other forged notes, etc.; and it has been decided that evidence may be given of a subsequent uttering, even though that subsequent uttering be made the subject of a distinct indictment.(*b*)

(*b*) R. *v.* Aston, 1 Russ. 407.

(1) Dana *v.* State, 2 Ohio St. 91.

(2) Brown *v.* People, 66 Ill. 344.

CHAPTER VI.

INJURIES TO PROPERTY.

One of the criminal consolidation acts, 1861,(*y*) deals with arson and malicious injuries to property.(*z*) Of these offenses the present chapter will treat.

ARSON.

Arson is the malicious and willful setting fire to any building. The term does not strictly comprise cases of setting fire to other things, such as corn, ships, etc.; but it will be convenient to treat here of them also.

The statute in different sections deals with setting fire to:

Churches, chapels, and other places of divine worship (§ 1).

Dwelling-house, any person being therein (§ 2).

House, stable, coach-house, out-house, warehouse, office, shop, mill, malt-house, hop-oast, barn, storehouse, granary, hovel, shed, or farm, or any farm building, or any building or erection used in farming land, or in carrying on any trade or manufacture, with intent thereby to injure or defraud any person (§ 3).

Station, warehouse, or other building belonging to any railway, port, dock, or harbor, or any canal or other navigation (§ 4).

Public building, as described in the act (§ 5).

All these cases of arson are felonies, punishable by penal servitude to the extent of life. Arson in the case of any other building is punishable by penal servitude to the extent of fourteen years(.*a*)

Besides these enactments with regard to setting fire to

(*y*) 24 and 25 Vict., c. 97.

(*z*) When merely a section is quoted in this chapter it must be understood to refer to that statute.

(*a*) § 6.

buildings, there are others dealing with the burning of other kinds of property.

[Arson at common law was an offense against the security of habitation. It was the willful and malicious burning of the house of another. House is a dwelling, and includes not only the mansion proper, but also the structures appurtenant to it. And the burning of a barn, though it be no part of a mansion, if it had hay and corn in it, was arson at common law.(1) In a civil case it was held that a building intended for and constructed as a dwelling-house, but which had straw and agricultural implements deposited in it, was neither a house nor a barn.(2) But where the entrance to a jail was through the dwelling-house of the jailer, and prisoners were sometimes suffered to lie in the dwelling, it was held the dwelling was part of the prison and the entire structure was a house.(3)

The house of another was not a house owned by another, but a house which was another's to occupy. If one burned the house which he owned and occupied, he did not commit arson; nor did a tenant, who burned the house which he rented and occupied. One who was in possession under an agreement for a short lease did not commit arson by burning such house.(4) But where the overseers of the poor put a pauper and his family as sole occupants into a house and let them stay there without paying rent, it was held the occupant had no interest in the house, that his possession was the possession of the overseers, and it was arson for him to burn it.(5) If the owner and occupant is temporarily absent, leaving his effects in it, the burning of it is arson.(6) But if the house be vacated without an intention to return, the burning is not arson.(7) A landlord

(1) Sampson *v.* Watson, Watts & Ser. 385.

(2) Elmore *v.* St. Briavell's, 8 B. & Cres. 461.

(3) Rex *v.* Donnavan, 2 W. Black. 683; State *v.* McGowan, 20 Conn. 245.

(4) Rex *v.* Breeme, 1 Leach, 220. (5) East, P. C. 1027.

(6) Johnson *v.* State, 48 Ga. 116.

(7) Commonwealth *v.* Barney, 10 Cush. 478; Hooker *v.* Commonwealth, 13 Grattan, 763.

who burns the house occupied by his tenant, commits arson.(1) Where a statute makes it arson to burn a house "the property of another," a tenant in possession may be convicted for burning the house which he occupies.(2) Where husband and wife occupy together a house belonging to the wife, it is not arson for him to burn it.(3) Nor for the wife to burn her husband's house.(4) But a servant has no possession, and he is guilty of the offense if he burns the house.(5)

Arson in Ohio is extended, by statute to cover any private building, the property of another, of the value of fifty dollars, any public building, any watercraft of the value of fifty dollars, any toll-bridge, any other bridge of the value of fifty dollars, and setting fire to or attempting to set fire to any thing in or near such, with intent to burn the same. It is made an equal offense to maliciously burn or set fire to any building of the value of fifty dollars, any goods or chattels of the value of fifty dollars, or any watercraft, the same being insured, with intent to prejudice the insurer.

To maliciously set fire to or burn any stack, grain, crib, fence, boards, etc., rails, tan-bark, or timber, is felony, if the property is worth thirty-five dollars or more, and a misdemeanor, if worth less. It is also a misdemeanor maliciously or negligently to set fire to woods, prairies, or grounds, not his own, or maliciously permit fire to pass from his own, to the destruction of property of another. 74 Ohio L. 247, 248.

The Kentucky statute prescribes the punishment for arson, leaving arson to be defined by the common law; and makes it felony to willfully burn any public building, or the office or depot of any railroad or canal, gas or telegraph company, any warehouse, storehouse, or any other house whatever, or any stack, rick, or shock of grain, or any timber or wood prepared for any purpose of use or sale, or any tan-bark, bridge or causeway, any kind of mill or factory, any

(1) Rex *v.* Harris, Foster Cr. L. 113.

(2) Allen *v.* State, 10 Ohio St. 287.

(3) Snyder *v.* People, 26 Mich. 106.

(4) Rex *v.* March, 1 Moody, 182.

(5) Rex *v.* Gowen; note to 2 East P. C. 1027; and note to Pedley's case, 1 Leach Cr. Law, 246.

railroad car, engine, wagon, buggy, carriage, threshing machine, etc., or any watercraft, or to attempt to commit any above offense. If any person willfully and maliciously burn any house within the walls of the penitentiary, or any part of such house, or if any person willfully, maliciously, and unlawfully burn any occupied dwelling-house, or any charitable institution, and death ensue from the burning of such dwelling or institution, the punishment shall be death or confinement for life in the penitentiary, at the discretion of the jury. Rev. Stat. (1877), 327, 328.

In Indiana, it is arson to willfully and maliciously set fire to a dwelling-house, out-house, barn, stable, boat, watercraft, mill, distillery, manufactory, artificer's shop, storehouse, room occupied as a shop or office for professional business, or building of any kind, or printing office of another, or any public bridge, court-house, jail, market-house, church, seminary, or college or building belonging thereto, or piled cord-wood, ricks or shocks, or growing grain, or fence, of the value of twenty dollars, or any public building connected with any railroad, or any bridge, or any part of the structure of a railroad; or, with intent to defraud the insurer, to set fire to any building or structure whatever, finished or unfinished, whatever, or any goods, wares, merchandise, or other chattels, which shall be insured against loss by fire; and if the life of any person be lost thereby, the offender is guilty of murder in the first degree. Rev. Stat. (1876), 437, 438.

Under the statute, before the amendment of 1867, it was held that an indictment for burning "a certain building called a saloon," was insufficient, for not showing for what purpose the building was occupied.(1) And that it is not arson to burn an unfinished dwelling, not yet occupied, that was not insured.(2)

The statute of Illinois is nearly the same as that of Ohio, and also provides that if the life be lost in consequence of an arson, the offender shall be deemed guilty of murder, and provides that if an owner, lessee, or occupant sets fire to, or attempts to set fire to, his own premises, with intent to burn

(1) State *v.* O'Connell, 26 Ind. 266.

(2) State *v.* Wolfenberger, 20 Ind. 242.

the building or property of another, he shall be deemed guilty as if he burned, or attempted to burn, the building or property of another. Rev. Stat. (1877), 351.

The statute of Iowa is nearly the same as that of Ohio, but has many discriminations as to the degree of punish ment, depending upon the fact, whether the structure is inhabited or not, and whether the burning is in the night or day. It provides, also, that the statute applies to a married woman who commits any of the offenses described, though the property set fire to or burnt may belong wholly or partly to her husband. Rev. Stat. (1873), 603, 604.

The statute of Michigan is, except as to the particular terms of imprisonment prescribed, substantially the same as that of Iowa. Rev. Stat. (1871), 2078-2080.]

It appears to still remain a felony, punishable with death, to set fire to any of her majesty's *ships of war*,(*m*) or works or vessels in the docks of the port of London ;(*n*) but sentence may be recorded instead of being given openly.

In viewing the crime, generally, we may notice :

i. The character, moral and physical, of the setting fire.

ii. The intent to defraud or injure (when that is an essential of the crime).

i. The act must be done *unlawfully and maliciously*.— Therefore, no mere negligence or mischance will amount thereto. But it is not necessary that the offense should be committed from malice(*o*) conceived against the owner of the property.(*p*) For example, if the accused, intending to set fire to the house of A., accidentally sets fire to the house

(*m*) 12 Geo. 3, c. 24, § 1.

(*n*) 39 Geo. 3, c. 69, § 1. See also naval discipline act, 29 and 30 Vict., c. 109, § 34.

(*o*) Here again the signification of malice as a motive, equivalent to ill-will, seems to have been present to the minds of the legislators. On the other hand, "maliciously" is to be taken in the technical sense of "with criminal intention."

(*p*) § 58. This section applies to all offenses coming within the arson and malicious injuries act.

of B., it is equally arson. Nor is it necessary that he should have had any intention of setting fire to any one's house; he will be guilty of arson, if, intending to commit some felony of an entirely different nature, he accidentally sets fire to another's house.(*q*) So, also, will he be guilty, if, by willfully setting fire to his own house, he burns that of his neighbor. If the act is proved to have been done willfully, it may be inferred to have been done maliciously, unless the contrary be proved.(*r*)

[But the wrongful act, which accidentally results in the burning of another's house, must be of a serious nature; otherwise, there will not be sufficient malice to constitute arson. Such wrongful act need not be felony.(1) But, if the act is a mere civil trespass, it is not sufficient.(2) And it has been held in the United States several times, that burning a hole in the floor of a jail, with the intent merely to effect an escape, is not arson.(3)]

As to the "setting fire," from a *physical* point of view, there must be an actual burning of some part, however trifling, of the house, etc. To support an indictment for setting fire to a house, it will not suffice merely to prove that something in the house was burnt.(*s*)

[If the floor is charred in a single spot, so that the fiber of the wood is there destroyed, the arson is complete.(4)]

ii. *The intent to injure or defraud.*—When it is necessary to allege this, there is no need to allege an intent to injure or defraud any particular person.(*t*)

When a person willfully sets fire to the house of another, the intent to injure that person is inferred from the

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(*q*) v. p. 18.

(*r*) Bromage *v.* Prosser, 4 B. & C. 247.

(*s*) R. *v.* Russell, C. & Mar. 541.

(*t*) § 60. This section also applies to the act generally.

(1) Rex *v.* Roberts, 2 East, P. C. 1030; Rex *v.* Isaacs, Ibid. 1031.

(2) 2 East, P. C. 1019.

(3) People *v.* Cotteral, 18 Johns. 115; State *v.* Mitchell, 5 Ire. 350; Delaney *v.* State, 41 Texas, 601.

(4) People *v.* Haggerty, 46 Cal. 354.

act. But if the setting fire is the result of accident, though the accused be engaged in the commission of some other felony, there can be no intent to defraud.

It is specially declared in the arson and malicious injuries act that its provisions apply to every person who, with intent to injure or defraud any other person, does any of the acts made penal, although the offender be in possession of the property in respect of which such act is done.(*u*)

MALICIOUS INJURY.

Having noticed one of the most dangerous forms of malicious injury—arson—it remains to consider others which are dealt with in the same act.(*x*) It will be remembered that here "malicious" is to be taken in its technical signification. To bring them within the pale of the criminal law, all the acts which we shall notice must be done maliciously and willfully.

[It was doubted whether, at common law, the misdemeanor called malicious mischief applied to injuries to real estate. The statutes which now describe in detail the acts that are indictable, include willful and malicious injury to realty as well as to animals and personal property generally. And some acts, generally depending upon the pecuniary amount of injury done, are made felonies. As these statutes are among the most frequently amended, and are in great detail, it is not needful to do more than to make this general reference.

It has been held that the malice which is an ingredient of this offense, is malice against the owner of the property, not malice against the animal or other property injured. Ordinarily, the willful injuring of another's property is sufficient evidence of malice against the owner. But if it does not appear that the injury was wanton or excessive punishment, or if it was done under the belief that the defendant had a right to commit it, and not from malice against the owner, it has been held that the offense was not com-

(*u*) § 59. (*x*) 24 and 25 Vict., c. 97.

mitted.(1) Accordingly, in the English statute of 9 Geo. 4, it was expressly provided that the offense was complete, whether the malice was against the owner or otherwise. And, in some of the states, as in Massachusetts, New York, and Ohio, cruelty to animals, whether by overloading, or cruelly beating, or tormenting, or privation of sustenance, is made a specific misdemeanor.]

(1) Rex *v.* Pierce, 2 East, P. C. 1072; State *v.* Robinson, 3 Dev. & Bat. 130; State *v.* Newby, 64 N. C. 23; Hill *v.* State, 43 Ala. 335; Hobson *v.* State, 44 Ala. 381; State *v.* Wilcox, 3 Yerg. 278; Goforth *v.* State, 8 Humph. 37; State *v.* Enslow, 10 Iowa, 115.

BOOK III.

HAVING considered the essentials of crime in general, and examined the character of particular crimes, a second portion of the matter with which the Criminal Law is concerned now presents itself to our notice, namely, the *proceedings*, which have for their object the conviction of the guilty and the discharge of the innocent. But before entering upon the subject of Criminal Procedure, it will be well to inquire what measures the law has adopted in order to render those proceedings as far as possible unnecessary; in other words, to treat of the Prevention of Offenses.

CHAPTER I.

PREVENTION OF OFFENSES.

UNDER this head fall two classes of measures, differing considerably in their nature. The first is applicable chiefly in the case of those who have to some extent erred, but whom it is not deemed advisable to visit with punishment in the strict sense of the term. The second consists of general measures and provisions for the prevention of the commission or repetition of offenses.

A. The first mode of preventing offenses may be generally said to consist in obliging those persons, whom there is probable ground to suspect of future misbehavior, to stipulate with and give full assurance to the public that the offenses which are apprehended shall not happen. This is effected by their finding pledges or securities, which are of two kinds:

i. For keeping the peace. ii. For good behavior. But in the first place we shall go over the ground which is common to both.

Of what does this "giving security" consist? The person of whose conduct the law is apprehensive is bound, with or without one or more securities, in a recognizance or obligation to the crown. This is taken by some court or by some judicial officer. The recognizance is of the nature following: The person bound acknowledges himself to be indebted to the crown in the sum specially ordered, with a condition that it shall be void if he appear in court(*a*) on such a day, and in the meantime *keep the peace* either generally toward the sovereign and his people, or particularly also with regard to the person who seeks the security. Or, as is more usual, the recognizance may be to keep the peace for a certain period, an appearance in court not being required. If it be for good behavior—then on condi-

(*a*) v. Arch. Q. S. 269.

tion that he demean and behave himself well, either generally or specially, for the time therein limited, as for one or more years, or for life. If the condition of the recognizance is broken, in the one case by any breach of the peace, in the other by any misbehavior, the recognizance becomes forfeited or absolute. It is *estreated*, or extracted from the other records, and sent up to the exchequer; the party and his sureties becoming the crown's absolute debtors for the the sums in which they are respectively bound.(*b*)

By whom may these securities be demanded? By any justice of the peace, and also by certain others who are regarded as conservators of the peace; for example, the judges of the queen's bench division, the coronor, sheriff, etc. They may demand the security at their own discretion, or at the request of a subject, upon his showing due cause. If the magistrate is unwilling to grant it, it may be obtained by a mandatory writ, called a *supplicavit*, which will compel him to act as a ministerial and not as a judicial officer. But this writ is seldom used; for when application is made to the superior courts, they usually take the recognizance there as they are empowered to do by statute.(*c*)

Any person under the degree of nobility may be bound over by a justice or at the quarter sessions. Wives may demand security against their husbands, and *vice versa*. Infants may demand security, and may be compelled to find security by their next friend.

The proceedings are the following in case of securities granted (a) by a justice out of sessions; (b) at the sessions.

(a.) If no sessions are sitting, the person requiring immediate security goes before a justice, and on oath makes his complaint, which is usually, though not necessarily, in writing. If the person complained of is present, he may be required at once to enter into the required recognizance; but if not present, the magistrate issues a warrant to bring him before himself or some other magistrate. The warrant is executed by the person to whom it is directed. If the delinquent refuses to go before the magistrate, he may be put into prison without any further warrant. When he

(*b*) 4 Bl. 252. (*c*) v. 21 Jac. 1, c. 8.

comes before the magistrate, he must offer sureties, or else he may be committed to prison for a term not exceeding twelve months.(*d*) The form of the recognizance is chiefly in the discretion of the magistrate, both as to the number and the sufficiency of the sureties, the largeness of the sum, and the time for which the party shall be bound.

(b.) By the sessions. Application may be made by the party requiring security at once to the sessions. And this is the more usual course. It should be made upon articles verified on oath, showing the facts to warrant it. If the person refuses, or is not prepared to enter into the recognizance, he may be committed.

So far the two kinds of security are on the same footing. They must now be considered separately.

i. *For the peace.*—This may be granted (a) *generally on public grounds.* Any justice may demand securities from the following: those who in his presence make an affray, or threaten to kill or beat one another; or who contend together with hot and angry words; or go about with unusual weapons or attendance to the terror of the people; also common barrators;(*e*) and those who, having been bound to the peace, have forfeited their recognizance by breaking it.(*f*) (b) *Specially*, by demand of a *private person* ("swearing the peace" against another). This security may be demanded by a person when he fears that another will kill him, his wife or child, or do him other corporal injury; or will burn his house; or will procure others so to do. The fear must arise from a threat, though that threat need not be expressed in words. The magistrate is required to grant the security if the applicant swears that he is in fear of death or bodily harm, and shows that there is ground for his fear; and swears that he is not acting out of malice or for mere vexation.(*g*)

The recognizance is forfeited (a) if *general*, by any unlawful action which is or tends to a breach of the peace; (b) if *special*, by any actual violence, or even terror or

(*d*) 16 and 17 Vict., c. 30, § 3.
(*e*) v. p. 83.
(*f*) 4 Bl. 254.
(*g*) 4 Bl. 255.

menace, to the person of the complainant, whether it be committed directly or indirectly by the person bound; (c) by default of appearance at the proper time, unless there be a valid excuse.(*h*) A mere civil trespass, or words of anger not amounting to a challenge to fight, will not cause a forfeiture.

ii. *For good behavior or abearance.*—This includes a surety for keeping the peace and something more. A magistrate may bind over to good behavior all those *that be not of good fame.* This general term includes not only those who act *contra pacem*, but also those who act *contra bonos mores.* It will comprise the following, among others:(*i*) rioters, barrators; those maintaining or constantly resorting to barrators; suspected persons who can not give good account of themselves; those who are likely to commit any crime; drunkards; cheats; vagabonds, etc.(*k*)

This kind of recognizance may be forfeited for the same reasons as the former, and for others also, as by committing any of those acts of misbehavior which the recognizance was intended to prevent, though there be no actual breach of the peace; but not by barely giving fresh cause of suspicion.

Security may be required in two classes of cases: (a) Where no actual crime has been committed; (b) where the party of whom security is taken has been convicted of some crime. In the latter case, if punishment is awarded, the court of summary jurisdiction may order the offender, at the expiration of his term of punishment, or if the punishment consists of a fine, at once to enter into a recognizance to keep the peace, or for good behavior. Or again, instead of awarding any punishment, the court may order the defendant to enter into such recognizance. In certain cases where the defendant has been convicted of an indictable offense, namely, of an indictable offense punishable under one of the criminal consolidation acts, 1861, he may be required to enter into his own recognizances and find sureties. In each of these acts there is inserted a clause to the following,

(*h*) v. 16 and 17 Vict., c. 30, § 2. (*i*) v. Burn's, 759.
(*k*) Dalton, c. 124.

effect: On conviction of an indictable *misdemeanor* punishable under one of those acts, the court may, if it think fit, in addition to, or in lieu of, any of the punishments authorized in the act, fine the offender, and require him to enter into his own recognizances and to find sureties, both or either, for keeping the peace and being of good behavior. And in case of any *felony* punishable under one of those acts, the court may require the offender to enter into his own recognizances and to find sureties, both or either, for keeping the peace, in addition to any punishment authorized by the act. But no person is to be imprisoned under this clause for not finding sureties for any period exceeding one year.(*l*)

[In Ohio, Kentucky, Indiana, and Iowa, the person apprehending injury makes written affidavit before a magistrate, who thereupon issues a warrant for the person complained of. When the accused is brought before the magistrate, the complaint is heard. If it does not appear that there is just cause for the complaint, the accused is discharged and recovers judgment for costs against the complainant. If it does appear that there is just cause, the accused is required to enter into recognizance for his appearance at the first day of the next term of the court having criminal jurisdiction, and meanwhile to keep the peace generally and especially toward the complainant. In Ohio and Indiana, the amount of the recognizance must be not less than fifty nor more than five hundred dollars. If the recognizance be not given, the accused is committed to prison, there to remain until discharged by due course of law. The court, upon the appearance of the parties, after hearing witnesses, may either discharge the accused and give judgment for costs against the complainant, or may render judgment for costs against the accused, and require him to give such further security to keep the peace and for such time as may be just; in default of giving such security, the accused is committed to jail until he complies with

(*l*) 24 and 25 Vict., c. 96, § 117; c. 97, § 73; c 98, § 51: c. 99, § 38; c. 100, § 71.

the order or is discharged by due course of law. In Kentucky, the complaint may be made in the first place before a circuit, county, or police court, which may bind the accused to keep the peace for one year or less.

In Illinois and Michigan, when the complaint is made, the magistrate in the first place inquires if there is probable cause, and for this purpose examines witnesses if necessary. If the magistrate is satisfied that there is danger that the offense complained of will be committed, the warrant of arrest is issued. When the accused is brought before the magistrate, if the charge is controverted, witnesses are heard. If it appear that there is no just reason to fear, the defendant is discharged. If there is just reason to fear, the defendant is required to give recognizance with sufficient surety, in such sum as the magistrate may direct, to keep the peace generally and especially toward the complainant, for a time to be fixed, but not to exceed twelve months. From this order the defendant may appeal to the court of criminal jurisdiction.

When a person in the presence of a magistrate makes an affray or threatens to commit an offense against the person or property of another, it is not necessary to issue a warrant, or hear witnesses. The magistrate may forthwith require the offender to enter into recognizance, and on failure so to do, to commit him to jail. This summary proceeding is not provided for in Indiana. And the section of the Ohio criminal code of 1877 which provides for it (§ 10, ch. 1) is inoperative by reason of an error in the number of a section referred to in it.]

CHAPTER II.

COURTS OF A CRIMINAL JURISDICTION.

[In the courts of the United States, the district court has jurisdiction of all crimes and offenses cognizable under the authority of the United States, committed within their respective districts, or upon the high seas, the punishment of which is not capital. Also of all cases arising under any act for the punishment of piracy, when no circuit court is held in the district of such court.(1)

The circuit court has jurisdiction of all suits and proceedings arising under § 5344, title "crimes," for the punishment of officers and owners of vessels, through whose negligence or misconduct the life of any person is destroyed. Also exclusive cognizance of all crimes and offenses cognizable under the authority of the United States, except where it is or may be otherwise provided by law and concurrent jurisdiction with the district courts, of crimes and offenses cognizable therein.(2)

In the organization of courts of criminal jurisdiction in the various states, there is a general conformity, with many differences in detail.

The ordinary jurisdiction of justices of the peace is, to issue warrants for the arrest of persons charged with crime; and, on the appearance of the accused, to hear the complaint, and then either discharge the accused or bind him over to appear before the court having jurisdiction of the crime charged, and transmit to the court a transcript of his proceedings. In some states, justices of the peace have a limited jurisdiction to hear and determine prosecutions for misdemeanors.

In Ohio, the justice has final jurisdiction in cases under the act for the prevention of cruelty to animals;(3) and

(1) Rev. Stats., § 563. (2 Rev. Stats., § 629.
(3) 72 Ohio L. 133.

when a person accused of a misdemeanor is brought before a magistrate, on complaint of the party injured, and pleads guilty to the charge, the magistrate may, at his discretion, sentence him to such punishment as he may deem proper, within the limits of the provision defining the offense, and order payment of costs, or bind him over to appear before the proper court.(1)

In Indiana, justices of the peace have exclusive jurisdiction in all cases where the fine assessed can not exceed three dollars, and concurrent jurisdiction with the court of common pleas [now circuit court] to try and determine all cases punishable by fine only, or by fine with discretion to imprison; but the justice can not impose a fine exceeding twenty-five dollars, and impose sentence of imprisonment, except to stand committed until the fine and costs be paid.(2)

In Illinois, they have original jurisdiction in all cases of misdemeanor, when the punishment is by fine only, and the fine does not exceed $200, and also in all cases of assault, assault and battery, and affrays, and in cases of vagrancy.(3)

In Iowa, they have jurisdiction to hear, try, and determine all public offenses, less than felony, in which the punishment prescribed by law does not exceed a fine of one hundred dollars or imprisonment for thirty days.(4)

In Michigan, they have jurisdiction in general to hear and determine prosecutions for offenses punishable by fine not exceeding one hundred dollars, or punishable by imprisonment in the county jail not exceeding three months, or punishable by both said fine and imprisonment.(5)

In cities, there is ordinarily some court, called mayor's court, or police court, or some other name, which has jurisdiction over violations of the ordinances of the city, to which is often added a more or less extended jurisdiction over misdemeanors. In most states there are some local courts with special criminal jurisdiction, as the Criminal

(1) 74 Ohio L. 320.
(2) Rev. Stat. (1876), vol. 2, pp. 669, 673.
(3) Rev. Stat. (1877), p. 400. (4) Rev. Stat. (1873), p. 715.
(5) Rev. Stat. (1871), p. 1622.

Court of Cook county, Illinois; the probate court, in certain counties in Ohio; and the county courts in Illinois. In the states generally there is a court of plenary jurisdiction, civil and criminal, in which all prosecutions under the laws of the state may be tried. This court is called, in Massachusetts, the superior court; in New York, the supreme court; in Ohio, the court of common pleas; in Iowa, the district court; in Kentucky, Indiana, Illinois, and Michigan, the circuit court. In Massachusetts, the supreme court, which is there the court of ultimate resort, has exclusive original jurisdiction in capital cases.]

SKETCH OF A CRIMINAL TRIAL.

We propose now to discuss, in their proper order, the various steps taken to secure the punishment of a criminal who is guilty of a felony or misdemeanor, in other words, to examine the proceedings in any ordinary criminal case.(*y*) But before doing this, it will be well to sketch a rough outline or map of the whole ground to be traversed before the offender suffers his punishment.

The first thing to be done is to lay hold of the prisoner or to *arrest* him. When he is arrested and brought before the magistrates, if they think the case ought to be sent on to trial, he is *committed* for trial; the magistrates either at once committing him to prison to await the trial, or allowing him to remain at large on his finding sufficient *bail* to insure his appearance when he is wanted. What particular *mode of prosecution* is to be adopted must be considered, as there are several ways of formal accusation. In most cases the prisoner will now be forthcoming to take his trial; but either on account of his having avoided the warrant of arrest, or because he has been admitted to bail and does not surrender, *process* must issue to bring him into

(*y*) That is, a case which is not dealt with summarily before the magistrates, or specially before some exceptional tribunal, as the House of Lords.

court. For some good reason it may be desirable to remove the trial to the supreme criminal court by a writ of *certiorari*. The day of trial having arrived, the prisoner is *arraigned*, or called to the bar of the court to answer the charge against him. If he does not confess, or stands mute, he will then show in what way he proposes to meet the charge [whether by moving to *quash* the information or indictment on the ground of some fatal irregularity], by *demurring* to the sufficiency, in point of law, of the charge; or by *pleading* some particular obstacle to his being convicted; or, generally, that he is not guilty. *Issue* is then joined, and the *trial* of the question in point takes place. The prisoner is said to be *convicted* on the jury finding a verdict of guilty; and *judgment*, and the other consequences of this conviction, follow. The effects of this judgment will, however, be avoided by its being *reversed*, or by the prisoner being *reprieved* or *pardoned*. Lastly, if the prisoner has been convicted of a capital crime, he must suffer *execution*.

CHAPTER III.

ARREST.

THE apprehending or restraining of a man's person, in order to insure his being forthcoming to answer an alleged or suspected crime.(z) Any person is liable to an arrest on a criminal charge, provided he is charged with such a crime as will at least justify holding him to bail when taken.

An arrest may be made either:

A. By warrant.

B. Without warrant. Here we shall have to distinguish three cases. Where the arrest is (a) by an officer; (b) by a private person; (c) by hue and cry.

A. A *warrant* is a precept under hand and seal to some officer to arrest an offender, that he may be dealt with according to due course of law.

A warrant may, under certain circumstances, be granted by the speaker of the house of lords or house of commons; or by the privy council; or by one of the secretaries of state. A judge of the queen's bench division may issue a warrant to bring before him for examination any person charged with felony. He may also issue his warrant for apprehending and holding to bail any person, upon affidavit or certificate of the fact that an indictment has been found, or information filed in that court against any such person for a misdemeanor.(a) Courts of oyer and terminer (*i. e.*, in general the assizes and central criminal court) and the justices at sessions may also issue warrants against

(z) It is almost unnecessary to remind the reader that a person may, under certain circumstances, be arrested in a civil proceeding, and not only for a crime.

(a) 48 Geo. 3, c. 58, § 1.

those against whom indictments for felony or misdemeanor have been found within their jurisdiction.

The above cases are of an exceptional character. Warrants are ordinarily issued by justices of the peace, not sitting in sessions. The law on this subject was consolidated by 11 and 12 Vict. c. 42.(*b*)

In what cases may it be issued.—When a charge or complaint has been made before one or more justices that a person has committed or is suspected to have committed any treason, felony, or indictable misdemeanor, or other indictable offense, within his or their jurisdiction; or that, having committed it elsewhere (even within the admiralty jurisdiction or on land beyond the seas,(*c*) he resides within his or their jurisdiction; then, if the accused is not in custody, two courses are open to the justice: (a) to issue a *warrant* to apprehend and bring the accused specially before himself, or, generally, before other justices of the jurisdiction; or (b) to issue, in the first place, a *summons* directed to the accused, requiring him to appear before himself or other justices of the jurisdiction; and then, only if the summons is disobeyed by non-appearance, to issue a warrant.(*d*)

[A summons is not used in the United States, except as against corporations, and in a few cases specially provided for. In Michigan, prosecutions under the liquor law may be commenced by summons.(1)]

A justice will also issue a warrant to apprehend a person against whom an indictment has been found, on the production to him of the certificate of the clerk of indictments at the assizes, of the peace at the sessions. If the party indicted is already in custody for some other offense, the justice may issue his warrant to the jailer, commanding him to detain the accused until he shall be removed by *habeas corpus*, for the purpose of being tried on the indict-

(*b*) This statute does not affect the metropolitan police, or the London police acts.

(*c*) 11 and 12 Vict., c. 42, § 2. (*d*) Ibid., § 1.

(1) Rev. Stat. (1871), vol. 1, p. 694.

ment, or until he shall otherwise be removed or discharged out of his custody in due course of law.(*e*)

[This paragraph does not apply to the United States But in the United States a justice in one state may, upon affidavit being filed with him, issue a warrant for the arrest of a person charged with being a fugitive from justice from some other state, or from one of the territories, and, upon hearing, may commit such fugitive to jail, to be there held a reasonable time, for a requisition to be brought from the proper state or territory.]

To enable a justice to issue a warrant in the first instance (*i. e.*, as in (a) above), it is necessary that an information and complaint, in writing, on the oath or affirmation of the informant, or of some other witness on his behalf, should be laid before the justice. But if a summons only is to be issued in the first instance, the information may be by parol and without oath.(*f*)

The *summons* is directed to the accused. It states shortly the charge, and orders him to appear before the justice issuing it, or some other justice of the jurisdiction, at a certain time and place. It is served by a constable on the accused personally, or at his last and usual place of abode.(*g*)

(*e*) 11 and 12 Vict., c. 42, § 3. (*f*) Ibid., § 8.

(*g*) Ibid., § 9. The following is an example of a summons:

"To John Styles, of, etc., laborer. Whereas you have this day been charged before the undersigned, one of her majesty's justices of the peace in and for the said county of , for that you, on, etc. (*the offense stated shortly*): These are therefore to command you, in her majesty's name, to be and appear before me on Thursday, the 15th day of June, at eleven o'clock in the forenoon, at , or before such other justice or justices of the peace for the said county as may then be there, to answer to said charge, and to be further dealt with according to law. Herein fail not.

"Given under my hand and seal, this 13th day of June, in the year of our Lord 1876, at , in the county aforesaid.

"J. H. [L. S.]"

[FORM OF SUMMONS FOR A CORPORATION.

"*State of Ohio, Hamilton County, ss.:*

"To the sheriff of the county of :

"Whereas, at the term, A. D. 18 , of the court of common pleas

The *warrant* is directed to a particular constable, or to the constables of the district where it is to be executed, or generally to the constables of the jurisdiction of the issuing justice. It states shortly the offense, and indicates the offender, ordering the constable to bring him before the issuing justice, or other justices of the same jurisdiction. It remains in force until executed, the execution being effected by the due apprehension of the accused.(*h*)

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of said county of , an indictment was found by the grand jury against [*give name of corporation*], for a certain misdemeanor to wit, for [*state the offense; copy the charge as set out in the indictment*].

"You are commanded to notify the said , to appear on the day of , A. D. 18 , before the court of common pleas of county, to answer to the said charge, and to be further dealt with according to law.

"Witness my hand and the seal of said court, this day of , A. D. 18 .

"E. L. [L. S.]

"*Clerk of Court of C. P., County, O.*"]

(*h*) 11 and 12 Vict., c. 42, § 10. An example of a warrant:

"To the constable of , and to all other peace officers in the said county of . Whereas, A. B., of , laborer, hath this day been charged upon oath before the undersigned, one of her majesty's justices of the peace in and for the said county of , for that he on , at , did, etc. [*stating shortly the offense*]: These are, therefore, to command you, in her majesty's name, forthwith to apprehend the said A. B., and to bring him before me, or some other of her majesty's justices in and for the said county, to answer unto the said charge, and to be further dealt with according to law.

"Given under my hand, etc." [*as in the case of a summons*].

[FORM OF WARRANT IN OHIO.

"*The State of Ohio, County, ss.:*

"To any constable of said county, greeting:

"Whereas, there has been filed with me an affidavit of which the following is a copy: [*here copy the affidavit*].

"These are therefore to command you to take the said E. F., if he be found in your county, or, if he has fled, that you pursue after him into any other county in the state, and take and safely [keep] the said E. F. so that you have his body forthwith before me, or some other magistrate of said county, to answer the said complaint, and be further dealt with according to law.

"Given under my hand, this day of , .

"A. B.,

"*Justice of the Peace.*"]

It may be issued on Sunday as well as on any other day.(*i*)

A warrant from the chief or other justice of the queen's bench division extends all over the kingdom, and is *tested*, or *dated*, England, not Oxfordshire, Berks, or other particular county. But the warrant of a justice of the peace in one county, as Yorkshire, must be *backed*, that is, signed by a justice of the peace in another, as Middlesex, before it can be executed in the latter.(*k*) But the justice backing, in certain cases, may require the accused to be brought before him, or some other justice of the jurisdiction.(*l*) A warrant issued in England may be backed not only in another jurisdiction in England, but also in Scotland, Ireland, or the Channel Islands, and *vice versa*.(*m*)

When a warrant is received by the officer, he is bound to execute it, so far as the jurisdiction of the justice and himself extends. And a warrant drawn up according to the statutory form will (even though the magistrate who issued it has exceeded his jurisdiction), at all events, indemnify the officer who executes the same ministerially.(*n*) The officer, in his own jurisdiction, need not show his warrant if he tells the substance of it. Bare words will not constitute an arrest without laying hold of the accused, or other-

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FORM OF WARRANT IN IOWA.

County of ,

The State of Iowa:

To any peace officer in the state:

Preliminary information upon oath having been this day laid before me, that the crime of [*designating it*], has been committed, and accusing A. B. thereof.

You are, therefore, commanded forthwith to arrest the said A. B., and bring him before me at [*naming the place*]; or, in case of my absence or inability to act, before the nearest or most accessible magistrate in this county.

Dated at , this day of , A. D. 18 .

C. D.,

Justice of the Peace.]

(*i*) 11 and 12 Vict., c. 42, § 4. (*k*) 4 Bl. 291. (*l*) Ibid., § 11.

(*m*) Ibid., §§ 12–15. See also 14 and 25 Vict., c. 55, § 18. As to the colonies, 6 and 7 Vict., c. 34, and 16 and 17 Vict., c. 118.

(*n*) 24 Geo. 2, c. 44.

wise restraining his liberty. [An arrest is made by an actual restraint of the person to be arrested, or by his submission to the custody of the person making the arrest Any manual touch is considered a restraint of the person. The person making an arrest must not use unnecessary violence.] The officer may break open doors to execute a warrant for treason or other felony, or a breach of the peace, if upon demand of admittance it can not otherwise be obtained.(*o*) An arrest for an any indictable offense may be made on Sunday; and, for felonies or breaches of the peace, in the night-time as well as the day.

If there is just cause, any justice or the sheriff may take of the county any number he thinks proper to pursue, arrest, and imprison traitors, felons, and breakers of the peace raising the *posse comitatus*); persons refusing to aid may be fined and imprisoned.(*p*)

A *general* warrant to apprehend *all* persons suspected of a crime is void. So a warrant to apprehend the authors, printers, and publishers of a libel, without naming them.(*q*) General warrants to take up loose, idle, and disorderly people, and search warrants, are perhaps the only exceptions to the rule.(*r*)

Though not strictly belonging to the subject in hand, namely, the arrest of criminals, it may be convenient here to notice *search warrants*. On the oath of a complainant that he has probable cause to suspect that his property has been *stolen*, reason for his suspicion being shown, a justice may issue a warrant to search the premises of a person suspected of the felony. And as to property otherwise the subject of fraudulent practices, it is provided that if any credible witness proves upon oath before a justice a reasonable ground for suspecting that any person has in his possession, or on his premise, any property with respect to which an offense punishable under the larceny act, 1861,

(*o*) As to killing a constable in the execution of his duty; when he is justified in killing the accused, v. p. 126.

(*p*) Dalton, c. 171. (*q*) Money *v.* Leach, 1 Bl. W. 555.

(*r*) 5 Burn's, 1131.

has been committed, he may grant a warrant to search for such property, as in the case of stolen goods.(*s*)

B. Arrest *without warrant.*

As to arrests by *officers*, they may be made by—

i. *Justices of the peace*, who may themselves apprehend, or cause to be apprehended, by word only, *i. e.*, without warrant, any person committing a felony or breach of the peace in his presence.(*t*)

ii. The *sheriff* may apprehend any felon or breaker of the peace within the county.

iii. The *coroner*, any felon within the county.

iv. A *constable* may arrest, without warrant, any one for treason, felony, or breach of the peace committed in his view, within his jurisdiction, and carry him before a magistrate. So, also, on reasonable charge of felony, or of having given a dangerous wound; or upon reasonable suspicion that one of the above offenses has been committed, though it should afterward appear that no felony or wounding had been committed. But, as a rule, he may not arrest without warrant in a misdemeanor, though he may interpose to prevent a breach of the peace, and to accomplish this object he may arrest the person menacing, and detain him in custody till the chance of the threat being executed is over.(*u*) Also he may arrest without warrant, and then must take before a justice of the peace as soon as reasonably may be, any person whom he finds lying or loitering in any highway, yard, or other place, during the night, and whom he has good cause to suspect of having committed, or of being about to commit, any felony against the larceny, arson, and malicious injuries to property, or offenses against the person acts respectively.(*x*) Also he may take into custody any holder of a license granted under the penal servitude acts, who is reasonably suspected of having

(*s*) 24 and 25 Vict., c. 96, § 103.

(*t*) As to apprehension, etc., for contempt in face of court, v. p. 90.

(*u*) v. 2 Hale, P. C. 88.

(*x*) 24 and 25 Vict., c. 96, § 104; c. 97, § 57; c. 100, § 66.

committed any offense or broken any of the conditions of his license.(*y*)

If, upon a reasonable charge for which he may arrest without warrant, the constable refuses, he may be indicted and fined. When he acts without a warrant, by virtue of his office as constable, he should, unless the party is previously acquainted with the fact, or can plainly see it, notify that he is a constable, or that he arrests in the queen's name, and for what.

The constable's right to break open doors, his justification in killing in the execution of his duty, and the consequence of his being killed, are generally the same as if he had proceeded upon a warrant.(*z*)

v. Arrests by *private persons*.—Any person who is present when a felony is committed, not only may, but is bound, without warrant, to arrest the offender. And a private person is bound to assist an officer who demands his aid in the lawful taking of a felon, or the suppression of an affray. If in any case the felon escapes through his negligence to assist, for which there is no good excuse, he is liable to fine and imprisonment. A private person also may arrest (a) any one whom he finds committing an indictable offense by night (*i. e.*, 9 P. M. to 6 A. M.);(*a*) or (b) a person committing *any* offense (except angling in the day-time) punishable under the larceny act;(*b*) or (c) a person committing an offense against the coinage act.(*c*) Also the owner of the property injured, or his servant, or any other person authorized by him, may apprehend a person committing any offense against the malicious injuries to property act.(*d*) Any person to whom property is offered to be sold, pawned, or delivered, if he has reasonable cause to suspect that any offense punishable under the larceny

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(*y*) 27 and 28 Vict., c. 47, § 6. Special acts regulate the powers of constables within the metropolitan police district.

(*z*) v. p. 248.

(*a*) 14 and 15 Vict., c. 19, § 11.

(*b*) 24 and 25 Vict., c. 96, § 103.

(*c*) Ibid., c. 99, § 31.

(*d*) Ibid., c. 97, § 61.

act has been committed with respect to such property, is authorized and required to forthwith take the party offering and the property offered before a magistrate.(*e*)

A private person may also arrest, without warrant, on reasonable *suspicion* of felony. But he does so at his peril, and is liable to the consequences of false imprisonment, unless he can afterward prove that a felony has actually been committed by some one, and that there was reasonable ground to suspect the person apprehended. (It will be remembered that a peace officer is not liable, although no crime has been committed, if there were reasonable grounds for suspicion.) Not that the private person has no course left open to him; he is justified in requiring a constable to do whatever the constable by virtue of his office is justified in doing.

There is this distinction between arrests in view of the crime and on suspicion by private persons. In the former case he may break open doors to effect the arrest; and the consequences of his killing or being killed are generally the same as if an officer were arresting. But if the arrest by a private person is merely on suspicion, he is not justified in breaking open doors; and if either party kills the other, it is said to amount to manslaughter at the least.

A private person may arrest another for the purpose of putting a stop to a breach of the peace committed in his presence.

[The criminal code of Ohio provides that any peace officer "shall arrest and detain any person found violating any law of this state, or any legal ordinance of a city or village, until a legal warrant can be obtained." "If a felony has been committed, any person may, without warrant, arrest another, who he believes, and has reason to believe, is guilty of the offense, and may detain him until a legal warrant can be obtained."(1)

In Kentucky, by the criminal code (§§ 36, 37), an officer or a private person, alike, can arrest without warrant, when

(*e*) 24 and 25 Vict., c. 96, § 103.
(1) 74 Ohio L. 317.

he has reasonable grounds for believing that the person arrested has committed a felony.

The statute of Illinois provides: "An arrest may be made by an officer or by a private person, without warrant, for a criminal offense committed or attempted in his presence, and by an officer, when a criminal offense has in fact been committed, and he has reasonable ground for believing that the person to be arrested has committed it."(1)

The statute of Iowa provides: "A peace officer, without warrant, may make an arrest—1. For a public offense committed or attempted in his presence; 2. Where a public offense has in fact been committed, and he has reasonable ground for believing that the person to be arrested has committed it. A private person may make an arrest—1. For a public offense committed or attempted in his presence; 2. Where a felony has been committed, and he has reasonable ground for believing that the person to be arrested has committed it."(2)]

Arrest upon *hue and cry*.—The old common-law process of pursuing with horn and with voice all felons and such as have dangerously wounded others. The hue and cry may be raised by constables, private persons, or both. The constable and his assistants have the same powers, protection, and indemnification as if acting under the warrant of a magistrate; and, if they have obtained a warrant, they may follow by hue and cry into a different county from that in which the warrant was granted, without getting it backed. Private persons who join, are justified, even though it should turn out that no felony has been committed. But if a person wantonly and maliciously, and without cause, raises the hue and cry, he is liable to punishment as a disturber of the peace.(*f*)

(*f*) For punishment of assaults committed on officers and persons acting in their aid, or on any other person lawfully authorized to apprehend or detain an offender, v. p. 156.

(1) Rev. Stat. (1877), p. 396. (2) Rev. Stat. (1873), p. 655.

CHAPTER IV.

PROCEEDINGS BEFORE THE MAGISTRATE.

WHEN an arrest has been made, the accused should be taken before a magistrate or magistrates, with all reasonable possible speed. When arrested on suspicion, he should not be detained before he is so taken, in order that evidence may first be collected.

The magistrate is bound to forthwith examine into the circumstances of the charge. In order to secure the attendance of witnesses to the fact, they may be served with a summons or warrant, in a manner similar to that in which the presence of the accused is insured. If a witness refuses to be examined, he is liable to imprisonment for seven days.(*l*) The room in which the examination is held is not to be deemed an open court; and the magistrate may exclude any person, if he thinks fit.(*m*) When the witnesses are in attendance, the magistrate takes, in the presence of the accused (who is at liberty, by himself or his counsel, to put questions to any witness produced against him), the statement on oath or affirmation of those who know the facts of the case, and puts the same in writing. These statements (technically termed *depositions*) are then read over to, and signed respectively by, the witnesses who have been examined, and by the magistrate taking such statements.(*n*) The magistrate reads, or causes to be read, over to the accused these depositions, and asks him if he wishes to say any thing in answer to the charge, cautioning him that he is not obliged to say any thing, but that whatever he does say will be taken down in writing, and may be

(*l*) 11 and 12 Vict., c. 42, § 16. As this is the chief act dealing with the subject of this chapter, reference merely to a section must be understood of that statute.

(*m*) § 19. (*n*) § 17.

used in evidence against him at his trial, at the same time explaining that he has nothing to hope from any threat which may have been holden out to him to induce him to make any admission or confession of guilt. Whatever the accused then says is taken down in writing, and signed by the magistrate.(*o*)

The magistrate then asks the accused whether he desires to call any witnesses. If he does, the magistrate, in the presence of the accused, takes their statement on oath or affirmation, whether such statement is given on examination or cross-examination, for they may be submitted to both. These statements, in the same way as those on the part of the prosecution, are read to and signed by the witnesses and by the magistrate. And the same rules apply to witnesses, both for the prosecution and for the defense (other than those merely to character), as to being bound over by recognizance to appear and give evidence at the trial.(*p*) If a witness refuses to enter into such recognizance, he may be committed to prison until the trial. The recognizances, depositions, etc., are transmitted to the court in which the trial is to take place.(*q*)

If the investigation before the magistrate can not be completed at a single hearing, he may, from time to time, *remand* the accused to jail for any period not exceeding eight days; or may allow him his liberty in the interval, upon his entering into recognizances, with or without securities, for reappearance.(*r*)

If, when all the evidence against the accused has been heard, the magistrate does not think that it is sufficient to put the accused on his trial for an indictable offense, he is forthwith discharged. But if he thinks otherwise, or the evidence raises a strong or probable presumption against the accused, he *commits* him for trial, either at once sending him to jail so as to be forthcoming for trial, or admitting him to bail.(*s*) Under certain circumstances a third course is open to the magistrate: he may dispose of the case and punish the offender himself.

(*o*) § 18. (*p*) 30 and 31 Vict., c. 35, § 3. (*q*) § 20.
(*r*) § 21. (*s*) § 25.

It will be noticed that there are two forms of commitment to prison: (a) *for safe custody;* (b) *in execution*, either as an original punishment, or as a means of enforcing payment of a pecuniary fine, or of enforcing obedience to the sentence or order of a magistrate or the sessions. The warrant of commitment under the hand and seal of the committing magistrate, directed to the jailer, contains a concise statement of the cause of commitment. By the *habeas corpus* act(*u*) the jailer is required, under heavy penalties, to deliver to the prisoner, or other person on his behalf, a copy of the warrant of commitment or detainer within six hours after demand. The imprisonment of which we are now speaking is merely for safe custody and not for punishment; therefore, those imprisoned are treated with much less rigor than those who have been convicted. Thus, they may have sent to them food, clothing, etc., subject to examination and the rules made by the visiting magistrates. They have the option of employment, but are not compelled to perform any hard labor; and if they choose to be employed, and are acquitted, or no bill is found against them, an allowance is paid for the work(*x*).

Bail.—This admitting to bail consists in the delivery (or bailment) of a person to his sureties, on their giving security (he also entering into his own recognizances) for his appearance at the time and place of trial, there to surrender and take his trial. In the meantime, he is allowed to be at large; being supposed to remain in their friendly custody.

We shall, in the first place, treat of the law of bail by the magistrate, and then of bail by the queen's bench division and other exceptional cases.

In what cases may, and in what cases may not, a magistrate take bail? Not if the prisoner is accused of *treason.* In that case it is allowed only by order of a secretary of state, or by the queen's bench division, or a judge thereof in vacation. If the prisoner is charged with some other

(*u*) 31 Car. 2, c. 2, § 5.
(*x*) 28 and 29 Vict. c. 126, sched. i, §§ 19, 20, 32, 33.

felony, or one of the *misdemeanors* enumerated below, the magistrate may, in his discretion, but is not obliged to, admit to bail. These misdemeanors are: Obtaining, or attempting to obtain, property by false pretenses; receiving property stolen or obtained by false pretenses; perjury or subornation of perjury; concealing the birth of a child by secret burying or otherwise; willful or indecent exposure of the person; riot; assault in pursuance of a conspiracy to raise wages; assault upon a peace officer in the execution of his duty or upon any person acting in his aid; neglect or breach of duty as a peace officer, or any misdemeanor for the prosecution of which the costs may be allowed out of the county rate. In other misdemeanors it is imperative on the magistrate to admit to bail.(*y*)

[Under the acts of Congress, bail must be taken upon all arrests in criminal cases where the offense is not punishable by death; and in capital cases, bail may be admitted by the supreme court, the circuit court, a justice of the supreme court, a circuit judge, or a judge of a district court.(1)

The constitution of Ohio provides that all persons shall be bailable by sufficient sureties, except for capital offenses, where the proof is evident or the presumption great. The same, or substantially the same provision is found in the constitution or the statutes of all the states.]

In cases where, in the exercise of their discretion, the magistrates have the power of admitting to bail or refusing it, the principle which is to guide them is the probability of the accused appearing to take his trial, and not his supposed guilt or innocence.(*z*) Though this latter point may be one element to be considered in applying the test. Thus it has been laid down that the points which the court will consider in exercising their discretion include the seriousness of the charge, the evidence in support of it, and the punishment which the law awards for the offense.(*a*)

(*y*) § 25. (*z*) R. *v.* Scaife, 5 Jur. 700.

(*a*) In re Barronet, 22 L. J. (M. C.) 25; In re Robinson, 23 L. J. (Q. B.) 286.

(1) Rev. Stat. p. 189.

Practically in charges of murder, bail is never allowed. And when a bill has been found against the accused, naturally more caution will be exercised.

Who may be bail? The magistrate (or court, v. *infra*) will act according to his discretion as to the sufficiency of the bail. The proposed bail may be examined upon oath as to their means, though in criminal cases no justification of bail is required. A married woman, an infant, or a prisoner in custody, can not be bail; nor can a person who has been convicted of an infamous crime.(*b*) The usual number of bail is two; but sometime only one is required, and sometimes three or more. The sureties or bail are not compelled to act as such for a longer time than they wish. If they surrender the accused before the magistrate or court by whom he has been bailed, he will be committed to prison, and they will be discharged of their obligation. But the accused may then find fresh sureties.

Both at common law and by statute,(*c*) to refuse or delay to bail any person bailable is a misdemeanor in the magistrate. But it has been held that the duty of a magistrate in respect of admitting to bail is a judicial duty; and therefore that not even an action can be maintained against him for refusing to admit to bail, where the matter is one as to which he may exercise his discretion.(*d*) It is provided by the bill of rights that excessive bail ought not to be required; though what is excessive must be left to be determined by the court in considering the circumstances of the case. If the magistrate or other authority admits to bail where this is not allowable, or if he takes insufficient bail, he is liable to punishment on the non-appearance of the accused.(*e*)

The stage in the proceedings where the question of bail

(*b*) v. R. *v.* Edwards, 4 T. R. 440.

(*c*) 3 Edw. 1, c. 15; 31 Car. 2, c. 2 (*habeas corpus*); 1 Wm. & M., st. 2, c. 1 (bill of rights).

(*d*) Linford *v.* Fitzroy, 18 L. J. (M. C.) 108; R. *v.* Badger, 12 L. J. (M. C.) 66.

(*e*) Hal. Sum. 97.

usually arises is when the accused is before the magistrates. But when a person charged with an indictable offense has been committed to prison to await his trial, it is lawful at any time afterward, before the first day of the sessions or assizes at which he is to be tried, for the magistrate who signed the warrant for his commitment to admit him to bail.(*f*)

As to bail in other cases than in proceedings before the magistrates:

The *queen's bench* division, or, in vacation time, a judge thereof,(*g*) has a discretionary power of admitting to bail a prisoner charged with an indictable offense, or on suspicion thereof; and this whether he is brought before the court by a writ of *habeas corpus* or otherwise. It may bail as well in cases where bail has been refused by the magistrate, as when the charge has been originally brought before the division. It may order the accused to be admitted to bail before a magistrate when it is inconvenient to bring him and his bail up to town.

It seems to be a good general rule that so far as any persons are judges of any crime, so far they have the power of bailing a person indicted before them of such crime:(*h*) so that—

Justices in sessions may bail persons indicted at the sessions.

Judges of jail delivery, etc., may bail those indicted at the assizes or central criminal court when they are sitting. If one accused of treason or felony is not tried at the first sessions of jail delivery after commitment, he may demand to be released or bailed, unless it appears on oath that the witnesses for the prosecution could not be present at those sessions. If he is not tried at the second sessions, he must be discharged from imprisonment.(*i*)

Coroners are authorized to admit to bail persons charged with manslaughter by verdict of the coroner's jury.(*k*)

It may be noticed here that at any time between the con-

(*f*) 11 and 12 Vict., c. 42, § 23. (*g*) 1 and 2 Vict., c. 45.
(*h*) 2 Hawk., c. 15, § 54. (*i*) 31 Car. 2, c. 2, § 7.
(*k*) 22 Vict., c. 33, § 1. As to personating bail, v. p. 200.

clusion of the examination before the magistrate and the first day of the trial at the assizes or sessions, the accused, whether held to bail or committed to prison for trial, may have on demand copies of the examination of the witnesses upon whose depositions he has been so held to bail or committed, on payment of a reasonable sum for the same, not exceeding three half-pence for each folio of ninety words.(*l*) And at the time of trial he may inspect the depositions without any fee.(*m*) The same rules apply also to depositions on behalf of the prisoner.(*n*)

The recognizances whereby the prosecutor and witnesses are bound over to appear at the trial, together with the written information (if any); the depositions; the statement of the accused; the recognizances of bail (if any); are to be delivered to the proper officer of the court where the trial is to be had.(*o*)

(*l*) 6 and 7 Wm. 4, c. 114, § 3; 11 and 12 Vict., c. 42, § 27.
(*m*) 6 and 7 Wm. 4, c. 114, § 4. (*n*) 30 and 31 Vict., c. 35, § 4.
(*o*) 11 and 12 Vict., c. 42, § 20; 30 and 31 Vict., c. 35, § 3.

CHAPTER V.

MODES OF PROSECUTION.

THE accused has either been committed to prison for safe custody, or has been left at liberty in virtue of his having found sureties for his appearance. The next point to be considered is the prosecution,(*p*) or manner of formal accusation. This may be either :(*q*)

A. Upon a previous finding of the fact by an inquest or grand jury.

B. Without such previous finding.

A. The most usual mode is by indictment, though it will be necessary in the first place to say a few words on—

Presentment.—This term, taken in a wide sense, includes both indictment by a grand jury and inquisitions of office. In a narrow sense it refers to the former only, and is the notice taken by a grand jury of any matter or offense from their own knowledge or observations, without any bill of indictment laid before them at the suit of the crown, as the presentment of a libel, etc., upon which the officer of the court must afterward frame an indictment before the party prosecuted can be put to answer it.(*r*) So that it differs from the ordinary proceedings merely inasmuch as no bill is delivered by an individual prosecutor, but the grand jury initiate the proceedings.

An *inquisition* of office is the act of a jury summoned to inquire of matters relating to the crown upon evidence laid before them. The most common kind of inquisition is that of the coronor, which is held with a view to find out the cause of death. The accused is arraigned upon the inquisition.(*s*)

(*p*) In a wide sense the term "prosecution" is applied to the whole of the proceedings for bringing the offender to justice.

(*q*) 4 Bl. 301. (*r*) Ibid. (*s*) v. p. 280.

An *indictment* is a written accusation of one or more persons of a crime preferred to, and presented on oath by, a grand jury. It lies for all treasons and felonies, for misprisions of either, and for all misdemeanors of a public nature at common law.(*t*) If a statute prohibits a matter of a public grievance, or commands a matter of public convenience (such as the repairing of highways, or the like), all acts or omissions contrary to the prohibition or command of the statute, being misdemeanors at common law, are punishable by indictment if the statute specifies no other mode of proceeding.(*u*) If the statute specifies a mode of proceeding different from that by indictment, then, if the matter was already an indictable offense at common law, and the statute introduces merely a different mode of prosecution and punishment, the remedy is cumulative, and the prosecutor has still the option of proceeding by indictment at common law, or by the mode pointed out by the statute.(*x*)

We shall presently deal with the preferment of an indictment to the grand jury; but first we must examine into the nature of such form of accusation. And for this purpose it will be well to give an example of an indictment, say for larceny, at common law:

> "*Suffolk, to wit: The jurors for our lady the queen upon their oath present that* ¶ *John Styles, on the* 1*st day of June, in the year of our Lord* 1876, *three pairs of shoes, and one waistcoat, of the goods and chattels of John Brown, feloniously did steal, take and carry away;* ¶ *against the peace of our lady the queen, her crown and dignity.*"(1)

(*t*) 2 Hawk., c. 25, § 4. (*u*) Ibid.
(*x*) R. *v.* Robinson, 2 Burr, 799.

(1) INDICTMENT FOR MURDER AT COMMON LAW.

State of Illinois, Marion County, ss.:

Of the term of the circuit court, in the year of our Lord one thousand eight hundred and seventy .

The grand jurors chosen, selected, and sworn in and for the county of Marion, in the name, and by the authority, of the people of the State of Illinois, upon their oaths present that A. B., of , etc., on

Three parts, marked off in the above form, are to be distinguished: (a) the commencement; (b) the statement; (c) the conclusion.

, at , in the county aforesaid, with force and arms, in and upon one C. D., feloniously, willfully, and of his own malice aforethought, did make an assault; and that the said A. B., with a certain knife made of iron and steel, which the said A. B. in his right hand then and there had and held, the throat of him, the said C. D., feloniously, willfully, and of his malice aforethought did strike and cut; and that the said A. B., with the knife aforesaid, by the striking and cutting aforesaid, did then and there give to him, the said C. D., in and upon the said throat of him, the said C. D., one mortal wound, of the length of three inches and the depth of two inches, of which said mortal wound the said C. D., from the said day of , to the day of , aforesaid, in the county aforesaid, did suffer and languish, and languishingly did live; on which said day of , aforesaid, in the year aforesaid, in the county aforesaid, he, the said C. D., of the said mortal wound, died. And so the jurors aforesaid, upon their oaths aforesaid, do say, that the said A. B., him, the said C. D., in manner and form aforesaid, then and there feloniously, willfully, and of his malice aforethought, did kill and murder, against the peace and dignity of the people of the State of Illinois.

INDICTMENT FOR MURDER IN THE FIRST DEGREE IN OHIO.

The State of Ohio, Hamilton County, ss.:

The Court of Common Pleas, Hamilton County, Ohio, of the term of June, in the year of our Lord one thousand eight hundred and seventy .

The jurors of the grand jury of the State of Ohio, impaneled, sworn and charged to inquire of offenses committed within the said county of Hamilton, in the name, and by the authority, of the State of Ohio, on their oaths, present and find that A. B., on the day of , in the year of our Lord one thousand eight hundred and , in the county of Hamilton aforesaid [in and upon one C. D., then and there being, did unlawfully, purposely, and of deliberate and premeditated malice make an assault, in a menacing manner, with intent him, the said C. D., unlawfully, purposely, and of deliberate and premeditated malice to kill and murder, and with a certain knife which he, the said A. B., in his right hand then and there had and held, him, the said C. D., then and there unlawfully, purposely, and of deliberate and premeditated malice, did strike, cut, and wound, with the intent aforesaid, thereby then and there giving to him the said C. D., in and upon the belly of him, the said C. D., one mortal wound, of the length of three inches and the depth of two inches, of which said mortal wound he, the said C. D., then and there instantly died; and so the jurors

(a.) The *commencement.*—In this the only part which requires comment is the *venue*, or the statement of the county or other division from which the grand jury by whom the indictment was found have come. In other words, it is the index of the place where, in regular course, the trial is to be had.(*y*) The consideration of this matter will be reserved for a separate chapter.

(b.) The *statement.*—This, the principal part of the indictment, must set forth with certainty all the facts and circumstances essential to constitute the crime; and must directly charge the accused with having committed it.

The defendant's *name* must be given correctly; or if it is not known, he must be described as a person unknown. So also with regard to the name of the person against whom the crime has been committed.

The *ownership* of any property in respect of which the

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aforesaid, upon their oaths and affirmations aforesaid, do say, that the said A. B. him, the said C. D., in the manner and by the means aforesaid, unlawfully, purposely, and of deliberate and premeditated malice did kill and murder], contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

INDICTMENT FOR MURDER IN THE SECOND DEGREE IN OHIO.

Commencement and conclusion as in the form for murder in the first degree; but, in place of the matter contained within brackets, substitute—

did unlawfully, purposely, and maliciously kill C. D., then and there being.

INDICTMENT FOR MURDER IN KENTUCKY.
(Form given in the criminal code.)

The Commonwealth of Kentucky
against
John Smith. } *Franklin Circuit Court.*

The grand jury of Franklin county, in the name, and by the authority, of the Commonwealth of Kentucky, accuse John Smith of the crime of murder, committed as follows, viz.: The said John Smith, on the 10th day of July, 1877, in the county aforesaid, did feloniously and with malice aforethought, kill and murder Thomas Jones, by stabbing him with a knife or some other edged weapon, against the peace and dignity of the Commonwealth of Kentucky.

(*y*) v. 14 and 15 Vict., c. 100, § 23.

offense was committed must be rightly laid. The property in goods (a) of a deceased person must be laid in the executors or administrators; (b) of a married woman in her husband, unless there is separate property under the married women's property act, 1870,(z) or there has been a judicial separation, or a protection order.(a) If the goods belong to partners or joint owners, one only need be named, and "another" or "others" added, as the case may be.(b) So property vested in a body of persons must not be described as the property of the body, but of all or some individuals of the body, unless it is incorporated. The property of joint-stock banking copartnerships may be laid in any one of the public officers.(c) Bridges, asylums, etc., must be described as the property of the inhabitants of the county, without specifying any names. If goods are stolen, etc., from a bailee, they should be described as the property either of the bailor or of the bailee, unless they were stolen by the bailor himself. If at the trial it appears that the property has been incorrectly laid, or the person against whom the offense was committed misnamed, unless such error be amended, the defendant must be acquitted. But, as we shall see,(d) the court has extensive powers of ordering amendment in case of such variance between the indictment and the evidence.

As to the statement of *time*.—No indictment will be held insufficient because it omits to state the time at which the offense was committed in any case where time is not of the essence of the offense; nor because it states the time imperfectly, or states the offense to have been committed on a day subsequent to the finding of the indictment, or on an impossible day, or on a day that never happened.(e) The time is of importance in several crimes, as in murder, bigamy, and burglary, and in cases where the time within which the prosecution must be commenced is limited.

As to *place*.—The nature of the crime in some cases re-

(z) 33 and 34 Vict., c. 93, see § 11.
(a) 20 and 21 Vict., c. 85, §§ 21, 25.
(b) 7 Geo. 4, c. 64 § 14.
(c) Ibid., § 9.
(d) v. p. 265.
(e) 14 and 15 Vict., c. 100, § 24.

quires this to be stated; otherwise the venue in the margin, that is, the county or other division, is taken as the venue for all facts in the indictment.(*f*) The following are the most common cases in which a local description is required: Burglary, housebreaking, stealing in a dwelling-house, sacrilege, nuisances to highways, etc.

The facts, circumstances, and intent, which are the ingredients of the offense, must be given with certainty, so that the defendant may be able to perceive what charge he has to meet, the court may know what sentence should be given, and that on future reference to the conviction or acquittal it may be known exactly what was the alleged offense.(*g*) In indictments for certain crimes particular technical words must be used, namely, in murder, *murdravit;* in rape, *rapuit;* in larceny, *felonice cepit et asportavit.* Again, as to the intent, treason must be laid to have been done "traitorously;" a felony, "feloniously;" burglary, "feloniously and burglariously;" murder, "feloniously and of his malice aforethought."

If any essential ingredient of the offense is omitted, or not stated with sufficient certainty, the defendant may move to quash the indictment, or may demur, or, if the defect is not one which is cured by verdict,(*h*) he may move in arrest of judgment, or bring a writ of error. All objections to formal defects must be taken before the jury are sworn; and they may then be amended by the court.(*i*)

The law as to the *amendment* of defects in the indictment is now on a much more reasonable footing than it was at one time. Instead of requiring the evidence rigorously and servilely to correspond with the indictment as it stands when drawn up, extensive powers of amendment are given to the court. Whenever there is a variance in certain points between the indictment and the evidence, it is lawful for the court before which the trial is had, if it considers that the variance is not material to the merits of

(*f*) 14 and 15 Vict., c. 100, § 23. (*g*) Arch. 54.

(*h*) As to what defects are cured by verdict, see Heymann *v.* R., L. R., 8 Q. B. 102.

(*i*) 14 and 15 Vict., c. 100, § 25.

the case, and that the defendant can not be prejudiced thereby in his defense on such merits, to order the indictment to be amended on such terms as to postponing the trial, as the court thinks reasonable. The points mentioned in the statute are the following: (a) in the name of any county, riding, division, city, borough, town corporate, parish, township, or *place* mentioned or described in such indictment; or (b) in the name or description of any person or persons, or body politic or corporate, therein stated or alleged to be the *owner* or owners of any property, real or personal, which shall form the subject of any offense charged therein; or (c) in the name or description of any person or persons, body politic or corporate, therein stated or alleged to be *injured* or damaged, or intended to be injured or damaged, by the commission of such offense; or (d) in the Christian name or surname, or both Christian name and surname, or other description whatsoever, of *any person* or persons whomsoever therein named or described; or (e) in the name or description of *any matter* or thing whatsoever therein named or described; or (f) in the *ownership* of any property named or described therein.(*k*) But in no case will an amendment which alters the nature or quality of the offiense be allowed.(*l*) The amendment must be made before verdict; and when it is once made there can be no amending the amendment, or reverting to the indictment in its original form.

[When indictments were drawn in Latin, it was fatal error to write "*collis*" instead of "*colli*," or "*murderavit*" instead of "*murdravit*." An indictment was fatally defective at common law, which averred the offense was committed "on the third day of August, eighteen hundred and forty-three," instead of "the year eighteen hundred and forty-three;(1) and it has been held the allegation would not be sufficient if the words "the year" were added, unless other words also were added, showing it was a year in the Christian era.(2) The indictment at common law is equally de-

(*k*) 14 and 15 Vict., c. 100, § 1. (*l*) R. *v.* Wright, 2 F. & F. 320.

(1) State *v.* Lane, 4 Ire. Law, 113.

(2) Commonwealth *v.* Loon, 5 Gray, 91.

fective, if the charge be that the defendant stole the goods of "the aforesaid J. S."—no J. S. having been previously named therein.(1) The same ruling was made where the allegation as to the injury was a wound inflicted "on the brest;"(2) also, where the indictment concluded, "against the peace of the state," instead of "against the peace and dignity of the state;"(3) and where it concluded, against the peace and dignity of "the State of W. Virginia," instead of "the State of West Virginia."(4)

Statutes were necessary to obviate these rigid rules of construction. The English statute giving the court the authority to amend the indictment was for this purpose. A similar provision is found in the statutes of Michigan.(5) In some states in the United States, difficulty has been found in giving so large authority to amend. Where the constitution prescribes that trial must be upon an indictment found by the grand jury, it has been held that if the indictment is amended, even with the consent of the defendant, it is no longer an indictment found by the grand jury, and no trial can be based upon it.(6) But it has also been held that, as the grand jury does not consider or find the formal parts of the indictment, or the name of the defendant, but only the statement of the offense charged, an amendment of a formal part, or of the name of the defendant, is not in conflict with that constitutional provision, and may be made.(7)

There is another provision generally found in the state constitutions, to the effect that the indictment must exhibit the nature and cause of the accusation against the defendant. It has been held that this does not prevent the legislature from regulating by statute the form of the indictment.(8) The crime charged must be set out; but this

(1) 1 Stark. Crim. Pl. 182; 2 Hawk. P. C., c. 25, § 72.

(2) Anonymous, 2 Hayward, 140. (3) Cain v. State, 4 Blackf. 512.

(4) Lemons v. State, 4 West Va. 755. (5) Rev. Stat. (1871), p. 2172.

(6) People v. Campbell, 4 Parker Crim. Ca. 386.

(7) Lasure v. State, 19 Ohio St. 43; Cain v. State, 4 Blackf. 512; Commonwealth v. Holley, 3 Gray, 458; State v. Manning, 14 Texas, 402; State v. Shricker, 29 Mo 265; People v. Kelly, 6 Cal. 210.

(8) State v. Mullen, 14 La. Ann. 570.

constitutional provision does not require the time, place, circumstances, or mode of commission to be stated.(1) Accordingly, a statute to the effect that, in an indictment for murder in the second degree or manslaughter, it shall not be necessary to set forth the manner in which, or the means by which, the death was caused, but it shall be sufficient to charge that the defendant did purposely and maliciously, or did unlawfully, kill the deceased, is not unconstitutional.(2)

The criminal code of Ohio, of 1877, provides that no indictment shall be deemed invalid, nor shall the trial, judgment, or other proceeding be stayed, arrested, or in any manner affected, by the omission of the words "with force and arms," or any words of similar import; nor for the omission of the words "as appears by the record;" nor for omitting to state the time at which the offense was committed, in any case in which time is not of the essence of the offense; nor for stating the time imperfectly; nor for want of a statement of the value or price of any matter or thing, or the amount of damages or injury, in any case where the value or price, or amount of damages or injury, is not of the essence of the offense; nor for the want of an allegation of the time or place of any material fact, when the time and place have once been stated in the indictment; nor that dates and numbers are represented by figures; nor for an omission to allege that the grand jurors were impaneled, sworn, or charged; nor for any surplusage or repugnant allegation, when there is sufficient matter alleged to indicate the crime or person charged; nor for want of averment of any matter not necessary to be proved; nor for any other defect or imperfection which does not tend to the prejudice of the substantial rights of

(1) Cathcart v. Commonwealth, 1 Wright (Pa.), 108; Noles v. State, 24 Ala. 672; Thompson v. State, 25 Ala. 41.

(2) Wolf v. State, 19 Ohio St. 248. But it is held in Indiana that the legislature has not the power to dispense with such allegations in an indictment as are essential to reasonable particularity and certainty in the description of the offense. McLaughlin v. State, 45 Ind. 338.

the defendant upon the merits. In an indictment for murder in the second degree or for manslaughter, it shall not be necessary to set forth the manner in which, or the means by which, the death was caused; but it shall be sufficient for an indictment for murder in the second degree to charge that the defendant did purposely and maliciously, and, in an indictment for manslaughter, that the defendant did unlawfully, kill the deceased. In an indictment for forging or uttering, it shall be sufficient to set forth the purport and value of the false instrument. In an indictment for counterfeiting or having possession, it shall be sufficient to describe, by its usual name or designation, the instrument, matter, or thing charged to be engraved or printed. It shall be sufficient to describe any written instrument by its usual name or designation, or by its purport. When it is necessary to make an averment as to any money, or bank bills, or notes, United States treasury notes, postal and fractional currency, or other bills, bonds, or notes, issued by lawful authority, and intended to pass and circulate as money, it shall be sufficient to describe the same simply as money, without specifying any particular coin, note, bill, or bond. In an indictment for perjury or subornation, it is not necessary to set forth any part of any record or proceeding, or the commission or authority of the court or other authority before which the perjury was committed. In prosecutions for illegal sale of intoxicating liquor, it shall not be necessary to allege the kind of liquor sold, nor describe the place where sold. It is sufficient to allege, in general, an intent to defraud, without alleging an intent to defraud any particular person or corporation. When an offense is committed in relation to property belonging to partners or joint owners, it is sufficient to allege the ownership in the firm by its firm name, or in any one or more of such partners or owners, without naming all. In an indictment for an offense in relation to any election, it is sufficient to allege that such election was authorized by law, without stating the names of the officers holding the elec-

tion, or the persons voted for, or the offices to be filled at such election.(1)

This statute is perhaps the latest and fullest, but all the states have statutes of the same character. The statute of Illinois is much less detailed. It provides that every indictment or accusation of the grand jury shall be deemed sufficiently technical and correct, which states the offense in the terms and language of the statutes creating the offense, or so plainly that the nature of the offense may be easily understood by the jury. All exceptions, which go merely to the form of an indictment, shall be made before trial, and no motion in arrest of judgment, or writ of error, shall be sustained for any matter not affecting the real merits of the offense charged in the indictment. No indictment shall be quashed for want of the words "with force and arms," or of the occupation or place of residence of the accused, nor by reason of any disqualification of any grand juror.(2)

In Michigan, the statute provides that, in any indictment for murder, it is sufficient to charge that the defendant did willfully and of his malice aforethought kill and murder the deceased, and, in manslaughter, to charge that the defendant did kill and slay the accused, without, in either case, setting forth the manner in which, or the means by which, the death of the accused was caused.(3)]

(c.) The *conclusion*.—The conclusion given in the foregoing example of an indictment is that which occurs in an indictment for an offense at common law. An indictment for an offense created by statute concludes thus: "Against the form of the statute in such case made and provided, and against the peace, etc." But an error in the form of the conclusion is not now material, inasmuch as it has been enacted that no indictment shall be held insufficient for the omission of the words "against the peace," nor for the insertion of the words "against the form of the statute," instead of "against the form of the statutes," or *vice versa*; nor for want of a proper or formal conclusion.(*m*)

(1) 74 Ohio L. 334–336. (2) Rev. Stat. (1877), p. 403.

(3) Rev. Stat. (1871), p. 2170.

(*m*) 14 and 15 Vict., c. 100, § 24. The same section also provides

Counts.—An indictment very frequently contains more than one count or charge. The object of the insertion of more than one count is either to charge the defendant with different offenses, or with a previous conviction; or to describe the single offense in other terms, so that proof of one description failing, he may be convicted under another. Thus, an indictment for wounding generally contains a count for doing grievous bodily harm. Again, an indictment for obtaining goods by false pretenses must state the false pretense correctly; therefore, in order to prevent a failure of justice in consequence of the false pretense not being properly stated, it is often necessary to insert different counts laying the pretense in different ways. The different counts are tacked on by the insertion of "and the jurors aforesaid, upon their oath aforesaid, do say that, etc."

As a rule, more than one offense can not be charged in the same count. This is commonly expressed by saying that a count must not be *double*, or is *bad for duplicity*. Thus one count can not charge the prisoner with having committed a murder and a robbery. There are two exceptions to the rule: An indictment for burglary usually charges the defendant with having broken and entered the house with intent to commit a felony, and also with having committed the felony intended. And in indictments for embezzlement by clerks, or servants, or persons employed in the public service, or in the police, the prosecution may charge any number of distinct acts of embezzlement, not exceeding three, which may have been committed against the same master within six months inclusive.(*n*) But

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that no indictment shall be insufficient for want of the averment of any matter unnecessary to be proved, nor for the omission of the words "as appears by the record," nor for that any person is designated by a name of office or other descriptive appellation, instead of his proper name; nor for want of, or imperfection in, the addition of any defendant; nor for the want of the statement of the value or price of any matter or thing, or of the amount of damage, injury, or spoil, in any case where the value or price, or the amount of damage injury, or spoil is not of the essence of the offense.

(*n*) 24 and 25 Vict., c. 96, § 71; see also § 5.

even here it is usual to charge the different acts in different counts.

So much for charging different offenses in one count. It remains to be seen what are the rules as to charging a defendant with different offenses in different counts of the same indictment:

In an indictment for *treason*, there may be different counts, each charging the defendant with different species of treason; for example, compassing the queen's death, levying war, etc.

In an indictment for *felony*, there is no objection in point of *law* to charging several different felonies in different counts, whether such felonies be of a different character or distinct cases of the same sort of felony; for example, whether they be a burglary and a murder, or two cases of murder. But in *practice*, as this course would embarrass the prisoner in his defense, it is not adopted, and it will be ground for quashing the indictment, though not for demurrer or arrest of judgment. If it is discovered, before the jury are charged, that it has been done, the judge may quash the indictment; if after, he may put the prosecutor to his election on which charge he will proceed. The same felony may, however, be charged in different ways in different counts; as if there is a doubt whether the goods stolen are the property of A. or of B., they may be stated in one count as the goods of A., in another as the goods of B. There are certain exceptions to the rule forbidding the charging of distinct felonies in different counts. In an indictment for feloniously stealing any property, it is expressly declared lawful to add a count or several counts for feloniously receiving the *same* property, knowing it to have been stolen, and *vice versa*; and the prosecutor is not put to any election, but the jury may find a verdict of guilty on either count, against all or any of the persons charged.(*o*) Also, in an indictment for larceny, it is lawful to insert several counts against the same person for any number of distinct acts of stealing not exceeding three, which may

(*o*) 24 and 25 Vict., c. 96, § 92.

have been committed by him against the same person within the space of six calendar months from the first to the last of such acts, and to proceed thereon for all or any of them.(*p*) We have already noticed a similar rule with regard to embezzlement.(*q*)

[Under an indictment consisting of a single count, it would be possible to prove several acts committed at different times, each one of which would support the indictment. This is sometimes attempted in practice. In such case the prosecutor is required to elect on which one of the offenses he will rely. The practice is not uniform as to the stage of the trial at which he will be required to make his election.(1) But stealing at one time several articles belonging to different owners is a single offense.(2) And embezzling several sums of money received at different times from different persons may constitute a single offense.(3)

The Ohio code provides that an indictment for larceny may contain a count for obtaining the same property by false pretense, a count for embezzlement thereof, and a count for receiving or concealing the same property knowing it to have been stolen, and the jury may find any or all the persons indicted guilty of either of the offenses charged in the indictment.(4)

The Michigan statute provides that an indictment for larceny may contain also a count for obtaining property by false pretenses, or for embezzlement, or for receiving or concealing stolen property, and the jury may find all or any of these persons indicted, guilty on either count.(5)

In Illinois, embezzlement is declared by statute to be lar-

(*p*) 24 and 25 Vict., c. 95, § 5. (*q*) v. p. 271.

(1) Stockwell *v.* State, 27 Ohio St. 563; State *v.* Bainbridge, 30 Ohio St. 264; People *v.* Jenness, 5 Mich. 305; People *v.* Hopson, 1 Denio, 574; Lovell *v.* State, 12 Ind. 18; State *v.* Bates, 10 Conn. 372; State *v.* Sims, 3 Strob. 137; State *v.* Smith, 22 Ver. 74; State *v.* Croteau, 23 Ver. 14.

(2) State *v.* Hennessey, 23 Ohio St. 339.

(3) Gravatt *v.* State, 25 Ohio St. 162; Brown *v.* State, 18 Ohio St. 496.

(4) 74 Ohio L. 336. (5) Rev. Stat. (1871), p. 2174.

ceny;(1) hence a single count for larceny would be supported by proof of either embezzlement or strict larceny.

The criminal code of Kentucky provides: Sec. 126. An indictment, except in the cases mentioned in the next section, must charge but one offense, but, if it may have been committed in different modes and by different means, the indictment may allege the modes and means in the alternative. Sec. 127. The offenses named in each of the subdivisions of this section may be charged in one indictment: 1. Larceny and knowingly receiving stolen property. 2. Larceny and obtaining money or property on false pretenses. 3. Larceny and embezzlement. 4. Robbery and burglary. 5. Robbery and an assault with intent to rob. 6. Passing or attempting to pass counterfeit money or United States currency or bank-notes, knowing them to be such, and having in possession counterfeit money or United States currency or bank-notes, knowing them to be such, with the intention of circulating the same

The statute of Indiana simply provides that counts for murder in the first and second degree and for manslaughter may be joined in the same indictment.(2) But where a count for embezzlement was joined in the same indictment with a count for larceny, the court refused to require the state to elect on which count the defendant should be tried.(3)

The Iowa code (sec. 4300) provides: The indictment must charge but one offense, but it may be charged in different forms to meet the testimony, and if it may have been committed in different modes and by different means, the indictment may allege the modes and means in the alternative; provided, that in case of compound offenses, where, in the same transaction, more than one offense has been committed, the indictment may charge the several offenses and the defendant may be convicted of any offense included therein.(4) Which provision is a concise statement of the common-law rule.]

If a count for a *felony* is joined with a count for a *mis-*

(1) Rev. Stat. (1877), p. 360. (2) Rev. Stat. (1876), vol. 2, p. 389
(3) Griffith *v.* State, 36 Ind. 406. (4) Rev. Stat. (1873), p. 668.

demeanor, the indictment will be held bad if demurred to, or judgment may be arrested if the verdict has been general (*i. e.*, guilty or not guilty on the whole indictment), but not if the prisoner is convicted of the felony alone.(*r*)

An indictment for *misdemeanor* may contain several counts for different offenses, even though the judgments upon each be different, so that the legal character of the substantive offenses charged be the same.(*s*) Thus, evidence of several assaults or several libels will be received on the several counts of the same indictment. But there are limits, not precisely defined, to this rule; when convenience and justice demands it, the judge compelling the prosecution to elect upon which charge they will proceed. In all cases of this character, the important consideration is, whether all the acts were substantially one transaction.

In certain cases if the prisoner has been *previously convicted*, a count is inserted in the indictment charging him with such previous conviction. He will have to plead to this, and proof may be given, if he denies it, as on any other count. The object of putting in this count is that the prisoner may have his identity with the person so previously convicted proved before the severer punishment consequent on a previous conviction is awarded. The cases in which such a count may be inserted are indictments for (a) felonies (not misdemeanors) mentioned in the larceny act,(*t*) or (b) for offenses under the coinage act, provided that the previous conviction be for some offense against that or some other coinage act.(*u*)

It should be noticed that in some cases the necessity for adding a second count, or preferring a second indictment, is obviated by the power which is given to the jury to find the defendant guilty of certain other offenses than those named in the indictment.(*x*)

(*r*) R. *v.* Ferguson, 24 L. J. (M. C.) 61.

(*s*) v. Young *v.* R., 3 T. R. 105. (*t*) 24 and 25 Vict., c. 96, § 116.

(*u*) Ibid., c. 99, § 37. 27 and 28 Vict., c. 47, § 2, seems to imply that a count for previous conviction of felony may be inserted in an indictment for any crime punishable with penal servitude. Rosc. 190.

(*x*) v. p. 384.

As to the *joinder of two or more defendants* in one indictment.—When several persons take part in the commission of an offense, they may all be indicted together, or any number of them together, or each separately; and, of course, some may be convicted and others acquitted. But certain offenses do not admit of a joint commission, for example, perjury. This joinder of defendants may be made the subject of demurrer, motion in arrest of judgment, or writ of error; or the court will in general quash the indictment.

As a rule, there is no *time limited* after the commission of a crime, within which the indictment must be preferred The offender is continually liable to be apprehended and visited with the penalties of the criminal law. By particular statutes, however, there are exceptions to this rule, a stated time being fixed after which criminal proceedings can not be commenced.

The indictment is usually drawn up by an officer of the court—the clerk of arraigns or the clerk of indictments at the assizes, the clerk of the peace at the sessions; but in cases of difficulty the assistance of counsel is obtained. On the indictment are indorsed the names of the witnesses intended to be examined before the grand jury. Here we must leave it for a time, merely adding that of course any number of indictments may be preferred against the same person, at the same time, for distinct offenses.

B. *Information.*

A criminal information is a complaint by the crown, in the queen's bench division, in respect of some offense, not a felony, whereby the offender is brought to trial, *without the previous finding by a grand jury.*(y)

(y) The term "information" is also used of (i.) the charge made to a magistrate of some offense punishable on summary conviction. (ii.) A complaint by one who is taking proceedings to recover a penalty, as where a statute awards a pecuniary penalty upon conviction for a given offense, and a judicial proceeding is instituted against some offender to recover the penalty. Inasmuch as the penalty is generally divided between the sovereign and the informer, *qui tam pro domina regina, quam pro se ipso sequitur*, they are termed *qui tam* actions. (iii.) A complaint of the crown, in the chancery or exchequer division, in respect of some

These criminal informations are of two kinds:

i. Informations *ex officio*.

ii. Informations by the master of the crown office.

i. An information *ex officio* is a formal written suggestion of an offense, filed by the attorney-general in the queen's bench division. It lies for misdemeanors only; for in treason and other felonies it is the policy of the English law that a man should not be put upon his trial until the necessity for that course has been shown by the oath of the grand jury. The reason for the exceptional proceeding without the grand jury is that some cases will not admit of the delay involved in the usual course of events. Thus, the proper objects of this kind of information are such enormous misdemeanors as peculiarly tend to disturb or endanger the government, or to interfere with the course of public justice, or to molest public officers; for example, seditious libels or riots, obstructing officers in the execution of their duties, bribery, etc., by magistrates or officers.(z) If the attorney-general delays for twelve months to bring the case on for trial, after due notice the court may authorize the defendant to do so. An information *ex officio* is in the following form:

"*Trinity Term*, 25 *Vict.*

"*Middlesex.—Be it remembered that Sir William Atherton, Knight, Attorney-General of our Sovereign Lady the Queen, who for our said lady the Queen prosecutes in this behalf, in his proper person comes into the court of our said Lady the Queen before the Queen herself at Westminster, in the county of Middlesex, on,*" etc. (stating the facts, etc., and concluding as in an indictment.)

ii. Information by the *master of the crown office.*—A formal written suggestion of an offense, filed in the queen's bench division at the instance of an individual, by the master of the crown office, without the intervention of a grand jury

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civil claim. (iv.) An information, *quo warranto*, is a remedy in the queen's bench division given to the crown against such as have usurped or intruded into any office or franchise.

(z) 4 Bl. 308.

Here, a point in which this differs from the former kind of information, the leave of the court has to be obtained. It lies only for misdemeanors, usually those of a gross and notorious kind, which, on account of their magnitude and pernicious example, deserve the most public animadversion (those particularly tending to disturb the government being usually left to the attorney-general as above), for example, bribery at elections, aggravated libels, etc.

The course of proceedings is the following: An application is made for a rule to show cause why a criminal information should not be filed against the party complained of. This application must be founded upon an affidavit disclosing all the material facts of the case. If the court grants a rule *nisi*, it is afterward, upon cause being shown, discharged or made absolute as in ordinary cases.

The form of this kind of information is similar to that of an information *ex officio*, substituting the name of the queen's coroner and attorney for that of the attorney-general.

When a criminal information has been filed either by the attorney-general *ex officio* or by the master of the crown office, it must be tried in the usual manner by a petty jury of the county where the offense arose. For that purpose, unless the case is of such importance as to call for a trial at bar, it is sent down by writ of *nisi prius* into that county and tried either by a common or special jury like a civil action. If the defendant is found guilty, he must afterward receive judgment from the queen's bench division.(*a*)

[The constitution of the United States provides, "No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or actual danger." The statutes provide that crimes against the elective franchise and civil rights, not infamous, may be prosecuted either by indictment or information filed by the prosecuting attorney.(1)

(*a*) 4 Bl. 308.

(1) U. S. Rev. Stat., p. 190.

This provision in the constitution of the United States does not apply to prosecutions in the state courts. The practice in the various states, as to prosecution by information, is far from uniform. The provision in the constitution of Ohio is the same with the one in the constitution of the United States, except that the exception of military cases is enlarged by excepting also cases of impeachment and cases of petit larceny, and other inferior offenses. Accordingly, prosecutions in courts whose jurisdiction is limited to cases of petit larceny and other inferior offenses, being probate courts with criminal jurisdiction and municipal police courts, are regularly tried on information filed by the prosecuting attorney.

Section 9 of the criminal code of Kentucky says: "All offenses may be prosecuted by indictment except—1. Offenses of public officers where a different mode of procedure is provided by law; 2. Offenses exclusively within the jurisdiction of justices of the peace or of police or city courts; 3. Offenses arising in the militia, of which a military court has exclusive jurisdiction."

In Indiana, by the act of 1873, prosecutions for misdemeanors in the circuit court may be by information or by indictment.(1)

The constitution of Illinois requires felonies to be prosecuted by indictment, permits misdemeanors to be prosecuted by information.

By the constitution of Iowa, all offenses less than felony, and in which the punishment does not exceed a fine of one hundred dollars or imprisonment for thirty days, shall be tried upon information; higher offenses upon presentment or indictment.

In Michigan, by an act passed in 1859, grand juries are dispensed with, except where the judge of the proper court shall, in writing, direct a grand jury to be drawn; and all offenses, which may be prosecuted by indictment, may be prosecuted by information.(2)

An information being presented by the prosecuting at-

(1) Rev. Stat. (1876), p. 376. (2) Rev. Stat. (1871), vol. 2, p. 2174.

torney, who is always present in court, can be amended.(1) It is, in form, the same as an indictment, except in the commencement, which reads:

The State of Ohio, *County, ss.*

county, term, in the year of our Lord one thousand eight hundred and seventy-

M. N., prosecuting attorney of the State of Ohio for the said county of , now here in said court, in and for said county, in the name, and by the authority, and in behalf of the State of Ohio, information gives that, etc.

Some forms add to the conclusion, "Whereupon the attorney prays the advice of this honorable court in the premises," or some equivalent phrase.]

Coroner's inquisition.

A coroner's inquisition is the record of the finding of the jury sworn to inquire, *super visum corporis*, concerning the death. On this, a person may [in England, but not in the United States], be prosecuted for murder or manslaughter, without the intervention of a grand jury, for the finding of the coroner's jury is itself equivalent to the finding of a grand jury. The defendant is arraigned on the inquisition as on an indictment; and the subsequent proceedings are the same. The practice is, when a prisoner stands charged on a coroner's inquisition with murder or manslaughter, to take him before the magistrate and to prefer also an indictment against him. Of course, he is tried both on the inquisition and the indictment at the same time. Thus, the sum of the whole matter is that the finding of the coroner's jury and the inquisition are practically disregarded and useless as far as criminal proceedings are concerned.

The proceedings are, shortly, the following: On receiving due notice of the sudden or violent death, the coroner issues his precept to the officers of the place where the body lies dead, requiring them to summon a jury (which must consist of twelve, at least), and names the time and place of inquiry. At the court, the jury are sworn, and then view the body. The witnesses are examined on oath,

(1) State *v.* Rowley, 12 Conn. 101.

and their evidence is put into writing by the coroner. He has authority to bind by recognizance all material witnesses to appear at the assizes, to prosecute and give evidence; and he must certify and subscribe the evidence and all such recognizances and the inquisition before him taken, and deliver the same to the proper officer of the court in which the trial is to be, before or at the opening of the court.(*c*)

The inquisition consists of three parts—the caption or *incipitur*, the verdict of the jury, and the attestation.(*d*) The rules as to certainty, description, etc., which prevail in the case of an indictment, apply also to an inquisition.

When the jury have returned a verdict of murder or manslaughter against a person, the coroner must commit him for trial, if present; if not in custody, the coroner may issue a warrant for his apprehension, and order him to be brought before himself or some magistrate of the jurisdiction.(*e*)

From the foregoing inquiry, we find that, apart from proceedings by way of summary conviction, practically the only modes of criminal procedure are by way of indictment or information. Of these, the former is much the more common; and, unless any thing be stated to the contrary, it will be this mode that will be kept in view in the succeeding pages.(*f*)

We have already seen (*g*) that a private individual is not obliged to set the law in motion for the prosecution of a criminal. But when he has given information or made complaint before a justice of the peace, on which the party charged with an indictable offense has been apprehended, he is then obliged to give evidence before such

(*c*) 7 Geo. 4, c. 64 § 4. (*d*) For example, v. Arch. 126.

(*e*) As to bail by coroners, v. p. 258.

(*f*) The old mode of trial by appeal, involving a trial by battle abolished after Thornton's Case (1 B. & Ald. 405), by 59 Geo. 3, c. 46 may just be mentioned.

(*g*) Ante, p. 85.

justice; and if the accused is committed for trial he may be, and usually is, bound over by recognizance to prosecute and give evidence.(*h*)

In order, however, to provide more effectually for the prosecution of offenses, an Act has recently been passed to provide for the appointment of a Director of Public Prosecutions with a staff of assistants.(*i*)

The duty of the Director of Public Prosecutions is set forth to be—to institute, undertake, or carry on under the superintendence of the Attorney-General criminal proceedings (whether in the Court for Crown Cases Reserved, before sessions of oyer and terminer or of the peace, before magistrates or otherwise), and to give such advice and assistance to chief officers of police, clerks to justices, and other persons, whether officers or not, concerned in any criminal proceeding, respecting the conduct of that proceeding, as may be for the time being prescribed under the Act, or may be directed in a special case by the Attorney-General.(*j*)

The regulations (which are to be made from time to time by the Attorney-General, and after being laid before Parliament to be approved by the Lord Chancellor and a secretary of state) (*k*) are to provide for the Director of Public Prosecutions taking action in cases which appear to be of importance or difficulty, or in which special circumstances, or the refusal or failure of a person to proceed with a prosecution, appear to render the action of such Director necessary to secure the due prosecution of an offender.(*l*)

The Act also provides for the transmission to the Director of Public Prosecutions of all recognizances, inquisitions, depositions, etc., whenever he undertakes any criminal proceeding, or when a prosecution which has been instituted is not proceeded with within a reasonable time.(*m*)

(*h*) 11 and 12 Vict., c. 42, ss. 16, 20.
(*i*) 42 and 43 Vict., c. 22. (*j*) 42 and 43 Vict., c. 22, s. 2.
(*k*) Ibid., s. 8. (*l*) Ibid., s. 2. (*m*) Ibid., s. 5.

When a criminal proceeding is undertaken by the Director of Public Prosecutions, it is not necessary for any person to be bound over to prosecute, and any person who has been bound over is released from his obligation.(*n*)

(*n*) 42 and 43 Vict., c. 22, s. 7.

CHAPTER VI.

PLACE OF TRIAL.

WE have already intimated(*g*) that the venue in the indictment, or place from which the grand jury who have found the bill have come, is also, in regular course, the place where the trial is had. It is now necessary to ascertain what that place is. The general common-law rule is, that the venue should be the jurisdiction within which the offense was committed; whether such jurisdiction be a county, a division of a county, a district including more than a county, as in the case of the central criminal court, or a borough. To the general rule, many exceptions have been made by statute.

[The territorial jurisdiction of the federal courts is bounded by circuits and districts, not by counties. The statutes provide that the trial of offenses punishable with death shall be had in the county where the offense was committed, when that can be done without great inconvenience. §§ 729–731. The trial of all offenses committed on the high seas, or elsewhere out of the jurisdiction of any particular state or district, shall be in the district where the offender is found, or into which he is first brought. When any offense against the United States is begun in one district and completed in another, it shall be deemed to have been committed in either, and may be indicted and tried in either.(1)

The rule in the courts of the several states is that a crime shall be tried in the county where it is committed. There is sometimes a question as to the real locality of a crime. When a thief flees with the property he has stolen, he is guilty of larceny in the county in which the larceny

(*g*) v. p. 263.
(1) Rev. Stat., p. 138.

was committed, and also in every county into which he takes the goods. It is generally held that a thief who goes with the property which he has stolen, into another state, is guilty of larceny in every county of such state into which he takes the goods. It is generally held that a thief who so brings goods into the state from a foreign country is not guilty of larceny in such state.(1) But it is provided by statute, in Illinois, that where property is stolen in another country, and brought into this state, the jurisdiction shall be in any county into which or through which the property may have passed, or where the same may be found.(2)

At common law, if one standing in one county shot at and killed a person in another county, the offense was committed in the second county; and, if one standing on land should so shoot and kill a person on the high seas, the offense was committed within the jurisdiction of the admiralty. And where one feloniously gave a mortal wound or administered poison, and the injured person removed to another county and there died, it was provided by statute of 2 and 3 Edward 6—which statute Mr. Bishop says is part of the common law—that the indictment should be found in the county where the death occurred. The criminal code of Ohio provides: Whoever, with firearms, or by sending poison or other thing, or by other means, kills or injures any person in another state or county, or whoever gives any mortal blow to any person who dies in another state or county, shall be tried and punished in the county where the offender was at the time the poison or other thing was sent or the force was used.(3)

The statute of Illinois varies from this, only in providing that where the offender and the party killed are in different counties at the time the cause of death is inflicted or administered, or if it is doubtful in which of several counties the cause of death was inflicted or administered, the accused may be tried in either county.(4) The criminal codes

(1) Stanley *v.* State, 24 Ohio St. 166.
(2) Rev. Stat. (1877), p. 402. (3) 74 Ohio L. 334.
(4) Rev. Stat. (1877), p. 402.

of Kentucky(1) and of Iowa(2) provide: If an offense be committed partly in one county and partly in another county, or if acts and their effects, constituting an offense, occur in different counties, the jurisdiction is in either county. In Michigan, where the injury is inflicted in one county, and the death ensues in another, the prosecution may be in either.

When a letter containing false pretenses, sent by mail, induces the owner of goods to deliver them to a designated carrier in one county, consigned to the writer in another county, the offense is committed in the first county.(3)

The Kentucky criminal code (§ 23) provides that if the offense consists of kidnaping, or seizing or confining a person without lawful authority, the jurisdiction shall be in the county in which the kidnaping, seizing, or confining was committed, or in any county in which it was continued. The Iowa statutes contain the same provisions, stated in greater detail.(2)

Some enactments are a distinct enlargement of jurisdiction. In Ohio, a receiver of stolen or embezzled goods may be tried in any county where he received or had the property.(4) In Iowa, when an offense is committed on any boat, raft, or vessel, navigating any water, or lying therein in the prosecution of its voyage, the jurisdiction is in any county through which the boat, etc., is navigated in the course of the voyage, or in the county where the voyage shall terminate.(2) A similar enactment has been held constitutional in Missouri.(5) The statutes of Illinois contain the same provision.(6) In Illinois(6) and Iowa,(2) it is also enacted that where an offense commenced without this state is consummated within this state, the offender shall be liable to punishment therefor in this state, though he was without the state at the time of the commission of the offense charged, if he consummated the offense within

(1) § 21.
(2) Rev. Stat. (1873), p. 649.
(3) Norris v. State, 25 Ohio St. 217.
(4) 74 Ohio L. 334.
(5) Stuman v. State, 10 Mo. 503.
(6) Rev. Stat. (1877), p. 402.

this state, through the intervention of any innocent or guilty agency, or any means proceeding directly or indirectly from himself; and, in such case, he may be tried and punished in the county where the offense was consummated. The Illinois statute further provides that when any offense is committed in any car passing over any rail road in the state, or any watercraft navigating any water therein, and it can not readily be determined in what county the offense was committed, the offense may be charged to have been committed, and the offender tried, in any of the counties through or along or into which such car or craft may pass, or can reasonably be determined to have been on or near, the day when the offense was committed.(1) In Iowa,(2) when an offense is committed on the boundary line of two or more counties, or within five hundred yards thereof, the jurisdiction is in either county. In Illinois(1) and in Michigan,(3) there is the same enactment, the distance named being one hundred rods.]

(1) Rev. Stat. (1877), p. 402. (2) Rev. Stat. (1873), p. 649.
(3) Rev. Stat. (1871), vol. 2, p. 2149.

CHAPTER VII.

THE GRAND JURY.

THE bill of indictment (as yet it is only a "bill," and is not correctly termed an indictment until found true by the grand jury) having been drawn up, the next step is to submit it to the grand jury.

Who are the grand jury? The sheriff of every county is required to return to every sessions of the peace, and every commission of oyer and terminer, and of jail delivery, twenty-four good and loyal men of the county, "to inquire into, present, do, and execute all those things which, on the part of our lady the queen, shall then be commanded them." Grand jurors at the assizes, or at the borough sessions (at the latter they must be burgesses, 5 and 6 Wm. 4, c. 76, § 121), do not require any qualification by estate; at the county sessions they must have the qualification required of petty jurors.(o) At the assizes, the grand jury generally consists of gentlemen of the highest position in the county.

After the court has been opened in the usual way by the crier making proclamation, the names of those summoned on the grand jury are called. As many as appear upon this panel are sworn. They must number twelve at least, but not more than twenty-three, so that twelve may be a majority. The usual proclamation against vice and profaneness is read; and then the person presiding in the court—the judge at the assizes, the chairman at the county sessions, the recorder at the borough sessions—charges the grand jury. The object of this charge is to assist the grand jury in coming to a right conclusion, by directing their attention to points which require special attention. He explains the force of any recent enactments, or any not

(o) 6 Geo. 4, c. 50, § 1.

frequently applied, which bear upon the matters laid before them. He also draws their attention, if necessary, to crimes which are liable to be confused, for example, larceny and embezzlement; and in general directs their inquiries to the proper channel.

The charge having been delivered, the grand jury withdraw to their own room, having received the bills of indictment. The witnesses whose names are indorsed on the bill are sworn as they come to be examined in the grand jury room; the oath being administered by the foreman, who, as each witness is examined, writes his initials opposite to the name on the back of the bill.(*p*) Only the witnesses for the prosecution are examined, seeing that the function of the grand jury is merely to inquire whether there is sufficient ground to put the accused on his trial. If the majority of them think that the evidence adduced makes out a sufficient case, the words "a true bill" are indorsed on the back of the bill; if they are of the opposite opinion, the words "not a true bill" are so indorsed, and in this case the bill is said to be ignored. They may find a true bill as to the charge in one count, and ignore that in another; or as to one defendant and not as to another; but they can not, like a petty jury, return a special or conditional finding, or select parts of counts as true and reject the rest. When one or more bills are found, the grand jury come into court and hand the bills to the clerk of arraigns, or clerk of the peace, who states to the court the name of the prisoner, the charge, and the indorsement of the grand jury. They then retire and consider other bills, until all are disposed of; after which they are discharged by judge, chairman, or recorder, presiding.

If the bill is thrown out or "cut," although it can not again be preferred to the grand jury during the same assizes or sessions, it may be preferred and found at subsequent assizes or sessions, of course within the time limited, if there be any time so limited.(*q*) We may anticipate, by reminding the reader that this can not be done in respect

(*p*) 19 and 20 Vict., c. 54, § 1. (*q*) Arch. 80. v. p. 276.

of the same offense if the petty jury have returned a verdict; unless, indeed, the prisoner is acquitted, on a charge of felony, merely on the ground that the proof establishes an act short of the felony charged, but which amounts to a misdemeanor, or another kind of felony. In such case the court orders him to be detained; and the proper course is to take him before the magistrate again.

We have pursued the ordinary method of criminal procedure by supposing that, in the first instance, there has been an examination before the magistrate. But this does not always take place. With certain exceptions, a person may prefer a bill of indictment against another before the grand jury without any previous inquiry into the truth of the accusation before a magistrate. This general right was, at one time, an universal right, and was often the engine of tyranny and abuse. It is easy to conceive how an innocent man's character might be injured, or at least how he might be put to great expense and inconvenience in defending himself against a charge founded on a true bill returned by the grand jury, who have heard only the evidence for the prosecution. A substantial check was put upon this grievance by the vexatious indictments act.(*r*) It provides that no bill of indictment for any of the offenses enumerated below shall be presented to or found by the grand jury unless one of the following steps has been taken: (a) The prosecutor or other person presenting such indictment has been bound by recognizance to prosecute or give evidence against the accused; or (b) the accused has been committed to, or detained in, custody, or has been bound by recognizance to appear to answer an indictment for such offense; (*s*) or (c) unless the indictment has been preferred by the direction, or with the consent, in writing, of a judge of the high court, or the attorney or solicitor-general of England, if the offense has been committed in England; or of a judge of one of the superior courts of law in Dublin, or the attorney or solicitor-general of Ireland, if the offense has been committed in Ireland; or (d) in case of an

(*r*) 22 and 23 Vict., c. 17.

(*s*) See § 2, as to a justice refusing to commit or bail

indictment for perjury, by the direction of any court, judge, or public functionary, authorized by 14 and 15 Vict., c. 100, to direct a prosecution for perjury. The offenses referred to are: Perjury, subornation of perjury, conspiracy, obtaining money or property by false pretenses, keeping a gambling house, keeping a disorderly house, indecent assault; and now, by the debtors act, 1869,(*t*) any misdemeanor under the second part of that act. The object of this salutary provision was furthered by a subsequent statute,(*u*) one section of which (sec. 2) allows the court trying an indictment for any of such offenses, in its discretion, to order the prosecutor to pay costs and expenses to the accused in the event of the latter's acquittal.

[The number of jurors required to constitute a grand jury differs in the various states. Sixteen are required in Kentucky, Illinois, and Michigan; fifteen suffice in Ohio and Iowa; while in Indiana, where the constitution authorizes the legislature to modify or abolish the grand jury system, the grand jury consists, by the act of 1875,(1) of six members. The rule is almost universal, that twelve of the members must concur to find an indictment; but in Georgia, an indictment for misdemeanor may be found by nine, and in Indiana, under the act of 1875, five are sufficient to find any indictment.

In most, if not all, the states, the prosecuting attorney may be present at their sessions, except while they are discussing or voting upon the question of finding a true bill. In Ohio, he may be present then also.(2)

The grand jury, in the United States, do not pass upon a bill of indictment presented by a private prosecutor; but consider a charge transmitted by an examining magistrate, or preferred or suggested by the prosecuting attorney or by one of their own number, and, after such consideration, find, or refuse to find, an indictment. The indictment is drawn up by the prosecuting attorney in accordance with

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(*t*) 32 and 33 Vict., c. 62, § 18. (*u*) 30 and 31 Vict., c. 35.
(1) Rev. Stat. (1876), p. 417. (2) 74 Ohio L. 330.

their finding. It must be indorsed "a true bill," and this indorsement signed by the foreman. In most states, the name of a prosecuting witness must, in certain cases, be indorsed on the indictment. who shall be liable for costs in case the prosecution be groundless and instigated without reason. In Ohio, an indictment for misdemeanor must be indorsed with the name of the prosecuting witness, or else with a statement that it was found upon testimony sent before the grand jury at the request of the prosecuting attorney or of the foreman.(1) In Illinois, no indictment for false imprisonment, or for willful or malicious mischief, shall be indorsed a true bill, unless either there is a statement, at the end thereof, that the same is found upon the information and knowledge of two or more of the grand jury, or the name of a prosecutor is indorsed, by the foreman, with such prosecutor's assent.(2) In Iowa, when any indictment is found, at the instance of a private prosecutor, it must be so indorsed.](3)

(1) 74 Ohio L. 332.
(2) Rev. Stat. (1877), p. 403.
(3) Rev. Stat. (1873), p. 663.

CHAPTER VIII.

PROCESS.

The grand jury have found a true bill. The next point to be considered is the process (the writs or judicial means) issued, or made to *proceed*, to compel the attendance of the accused to answer the charge. Of course this is not required if he is in custody or surrenders to his bail; in such case he may be tried as soon as is convenient. If he is in custody of another court for some other offense, the course is to remove him by a writ of *habeas corpus*, and bring him up to plead. But if he is already in the custody of the same court, there is no need for such writ.(*x*)

If, however, an indictment has been found in the absence of the accused, he having fled or secreted himself so as to avoid the warrant of arrest, or has not been bound over to appear at the assizes or sessions, then process must issue to bring him into court. It is contrary to the policy and humanity of the English law to try an indictment in the absence of the accused.(*y*)

Process in ordinary cases is now regulated by 11 and 12 Vict., c. 42, § 3. When an indictment has been found at the assizes or sessions against some person who is at large, the clerk of indictments, or clerk of the peace, after such assizes or sessions, upon the application of the prosecutor or any person on his behalf, will grant a certificate of such indictment having been found. Upon production of this certificate to any justice of the jurisdiction where the offense is alleged to have been committed, or in which the accused resides, or is, or is suspected of residing or being, such justice may and must issue his warrant to apprehend the person so indicted and bring him before some justice of the jurisdiction, who, upon proof by oath that the per-

(*x*) 30 and 31 Vict., c. 35, § 10. (*y*) But v. p. 301.

son present is the person indicted, will, without further inquiry or examination, commit him for trial or admit him to bail.(*z*) Provision is also made for the backing of such warrant if the accused is out of the above jurisdiction.(*a*) If he is already in prison, the justice must issue his warrant to the jailer ordering him to detain him until removed by *habeas corpus* or otherwise in due course of law.(*b*)

Another mode of proceeding is, for the court before whom the indictment is found to issue a *bench warrant* for the arrest of the accused, and to bring him immediately before such court. At the assizes it is signed by the judge, at sessions by two justices of the peace. Any judge of the queen's bench division, upon affidavit or certificate that an indictment has been found, or information filed in that court, may issue his warrant for apprehending and holding the accused to bail; and in default of bail he may commit him to prison.(*c*)

In cases not provided for as above, the following are the steps. In *misdemeanors*, when the indictment is found, a writ of *venire facias ad respondendum* (which may be issued by the queen's bench division, a judge of assize, or a court of quarter sessions) is issued, its nature being a summons to cause the party to appear. If he makes default in appearing to answer to this writ, a writ of *distringas* may be issued from time to time. If he still fails to appear, and the sheriff makes return that he has no lands, a writ of *capias ad respondendum*, commanding the sheriff to take his body to answer the charge, may be issued; and if he is not taken on the first *capias*, a second and a third, termed an *alias* and a *pluries*, may issue. Upon an indictment for felony a *capias* may issue in the first instance.

If none of these modes of summary process are effectual, the accused is liable to *outlawry*, the consequences differing according as the charge is one of misdemeanor or of felony.

First, in the case of *misdemeanors*.—The proceedings are by *venire facias*, *distringas*, *capias*, *alias capias*, *pluries capias*, as above. If none of these measures accomplish their object, a writ of *exigent* is awarded, by which the sheriff is

(*z*) 11 and 12 Vict., c. 42, § 3.
(*a*) Ibid., § 11.
(*b*) Ibid., § 3.
(*c*) 48 Geo. 3, c. 58, § 1.

required to proclaim or exact the defendant, and call him five successive county court days, charging him to appear upon pain of outlawry. The defendant still not appearing, on the fifth county court day judgment of outlawry is pronounced by one of the coroners for the county. The judgment of outlawry in misdemeanors operates as a conviction of the contempt for not answering.(*d*)

In *felonies* (including treason) the proceedings are more summary, though they are followed by graver consequences. The first process is a *capias*, and the other proceedings ensue as above. The outlawry amounts to a conviction or attainder of the offense charged in the indictment, as if the defendant had been found guilty by a jury. Formerly, an outlawed felon was considered as literally out of the pale of the law, and might be killed by any one; but now, of course, it would be murder, unless the killing were caused in an endeavor to apprehend him. Any one may arrest an outlaw on a criminal prosecution, either of his own head or by writ or warrant of *capias utlagatum*, in order to give him up to the law.(*e*)

The general consequences of outlawry, both in felonies and misdemeanors, are the following: The person outlawed is *civiliter mortuus*. His goods are forfeited from the *exigent*, his lands from the outlawry, and the act abolishing forfeiture in general does not interfere with this.(*f*) He can not hold property given or left to him. He can not sue on his own contract, nor can he sue for the redress of any injury. He may be a witness, but can not be a juror.(*g*)

As to the *reversal* of the outlawry.—If there has been any mistake or omission in the proceedings, or for other cause—for example, if the defendant was in prison—the accused may have the benefit of this. In cases of felony, he must render himself into custody, and pay the allowance of the writ of error in person; if it be reversed, he must

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(*d*) Arch. 86.
(*e*) 4 Bl. 319.
(*f*) 33 and 34 Vict., c. 23, § 1.
(*g*) v. Bac. Abr.

still meet the indictment. In other cases, he may appear by attorney.(*h*)

Process on informations is similar to that on indictments. But the first process is by writ of *subpena*, instead of *venire*; and then, if this is not effectual, a *capias*. But, if it is necessary to proceed to outlawry, the first process is by *venire facias* (as in an indictment for misdemeanor), and not by subpena.(*i*)

The appearance of the accused having been enforced in this way, or voluntarily made, the next step is to arraign him. But we must first treat of an exceptional proceeding, which sometimes, at this stage, intervenes to remove the proceedings to a higher court.

[In the United States, when an indictment or information is filed, a warrant issues from the court in which it is filed, unless the defendant is already in arrest or on bail. In Kentucky, in cases of misdemeanor, a summons issues, unless the court orders a warrant.(1) In Ohio(2) and Iowa,(3) a corporation is brought into court by summons; from and after the return day of a served writ (in Iowa, from and after two days after service), such defendant is held to be continuously present in court, till final disposition of the prosecution. Outlawry and the writs of *distringas* and *exigent* are not used.]

(*h*) 4 and 5 Wm. 3, c. 18. v. Solomon *v.* Graham, 5 Ell. & Bl. 320.
(*i*) v. 1 Chit. Cr. L. 865.
(1) Criminal Code, § 148. (2) 74 Ohio L. 337.
(3) Rev. Stat. (1877), p. 672.

CHAPTER IX.

CERTIORARI.

We have already ascertained where the trial of an offense will, in the regular course of things, take place. But any criminal proceeding may be removed by a writ of *certiorari* into the queen's bench division, the supreme court of criminal jurisdiction. This writ is directed to the inferior court, requiring it to return the records of an indictment or inquisition depending before it, so that the party may have a trial in the queen's bench division, or before such justices as the queen shall assign to hear and determine the cause. The result is that the jurisdiction of the inferior court is superseded; all proceeding there are illegal, unless the queen's bench remands the record back to the inferior court for trial. The proper time to apply for this writ is before issue is joined on the indictment, or at least before the jury are sworn; but it has been allowed at any time before judgment, and even afterward, when error does not lie. But applications at such a stage are discouraged, and special cause must be shown.(*k*)

In what cases is it granted? It is demandable as of right by the crown, and issues as of course when the attorney-general or other officer of the crown applies for it, either as prosecutor or as conducting the defense on behalf of the crown.(*l*) Formerly, it was granted almost of course to private prosecutors; but now, by them, as by defendants, leave must be applied for, and this may be refused.(*m*) It is also provided that no indictment (except indictments against bodies corporate not authorized to appear by attorney in the court in which the indictment is preferred) shall be removed into the queen's bench division, or central

(*k*) 2 Hawk., c. 27, § 28. v. R. *v.* Garside, 2 A. & E. 266.
(*l*) R. *v.* Eaton, 2 T. R. 89. (*m*) 5 and 6 Wm. 4, c. 33.

criminal court, by writ of *certiorari*, either at the instance of prosecutor or of defendant (except the attorney-general on behalf of the crown), unless it be made to appear to the court from which the writ is to issue, by the party applying the same, (a) that a fair and impartial trial of the case can not be had in the court below; or (b) that some question of law of more than usual difficulty and importance is likely to arise upon the trial; or (c) that it may be necessary to have a view of the premises in respect whereof the indictment is preferred; or (d) that a special jury may be required, to insure a satisfactory trial.(*n*) But, among other cases, an application by the defendant will not be granted for the removal of an indictment for perjury, forgery, or other heinous misdemeanors, when the delay tends to defeat the prosecution,(*o*) nor for murder.(*p*) Nor, in general, will it be removed from a court of competent jurisdiction, where one of the judges presides, except by consent of the prosecutor.(*q*)

The mode of obtaining the writ is the following: The application must be founded on an affidavit suggesting adequate ground for the removal. Motion must be made in court, or to a judge in chambers, and leave obtained, and this whether the application is made on the part of the prosecution or of the defense.(*r*) When it is granted at the instance of the defendant, the amount of recognizance to be entered into before a judge of the queen's bench division, or a justice of the jurisdiction where the defendant resides, by the defendant and his bail, is ordered by the court and indorsed on the writ.(*s*) Moreover, when at the instance of the defendant, this recognizance must contain the further provision that the defendant, if convicted, will pay to the prosecutor his costs incurred subsequent to the removal of the indictment; and when, at the instance of the prosecutor, he must enter into a recognizance, with the condition that he will pay the defendant, if acquitted, the costs in-

(*n*) 16 and 17 Vict., c. 30, § 4. (*o*) 2 Hawk., c. 27, § 28.
(*p*) R. v. Mead, 3 D. & R. 301. (*q*) Arch. 99.
(*r*) 5 and 6 Wm. 4, c. 33, § 1.
(*s*) 5 and 6 Wm. & M., c. 11; 5 and 6 Wm. 4, c. 33.

curred subsequent to such removal.(*t*) And if such recognizance be not entered into by the parties at whose instance the *certiorari* is awarded, the court proceeds to trial as if the writ had not been awarded.(*u*) It is after this recognizance has been lodged with the clerk of assize or clerk of the peace that all proceedings in the court below are erroneous.

Provision is made by statute (*x*) for the trial at the central criminal court of indictments or inquisitions for felonies or misdemeanors committed out of the jurisdiction of the central criminal court, which has been removed by *certiorari* into the queen's bench division; and for the removal of such indictment or inquisition by order of the queen's bench division directly into the central criminal court from an inferior court.

(*t*) 16 and 17 Vict., c. 30, § 5. (*u*) Ibid., § 7.
(*x*) 19 and 20 Vict., c. 16, §§ 1, 3.

CHAPTER X.

TIME OF TRIAL, ETC.

A TRUE bill has been found against the defendant, and his attendance has been secured by one of the means indicated above. When will he take his trial at the hands of the petty jury?

Indictments for *felony* are tried at the same assizes or sessions at which they are found by the grand jury. The trial may, however, be postponed to the next assizes or sessions, on the application of either the prosecutor or the defendant. But he must satisfy the court, by affidavit, that there is sufficient cause for the postponement, such as the illness or unavoidable absence of a material witness. The defendant will be detained in custody till the trial, or admitted to bail; or, if the application for postponement is made by the prosecution, the defendant may be discharged on his own recognizances.(*y*)

In *misdemeanors*, formerly when the defendant was not in custody, it was the practice not to try him at the same assizes or sessions at which he pleaded not guilty to the indictment, but to require him to give security to appear at the next assizes or sessions. But now it is provided, generally, that no person prosecuted is entitled to traverse or postpone the trial of any indictment found against him at any session of the peace, session of oyer and terminer, or of jail delivery; provided always, that if the court, upon the application of the person so indicted or otherwise, be of opinion that he ought to be allowed a further time, either to prepare for his defense or otherwise, such court may adjourn his trial to the next subsequent session, upon such terms, as to bail or otherwise, as seem proper to the court, and may respite the recognizances of the prosecutor and wit-

(*y*) R. *v.* Beardmore, 7 C. & P. 497.

nesses accordingly; in which case the prosecutor and witnesses are bound to prosecute and give evidence at such subsequent session, without entering into any fresh recognizance for that purpose.(z)

As to the order of trial of prisoners at the same assizes or sessions, the indictments found are filed by the clerk of arraigns or clerk of the peace in the order in which they are received from the grand jury. And, roughly speaking, this is the order of trial, felonies, as a rule, being taken before misdemeanors, and cases in which the defendant is in custody before bail cases. But this arrangement is subject to the discretion of the judge, who constantly sets it aside to suit the convenience of counsel, and for other purposes.

ARRAIGNMENT.(a)(1)

The arraignment, or requiring the prisoner to answer to the charge of an indictable offense, consists of three parts:

(a.) Calling the prisoner to the bar by name.

(b.) Reading the indictment to him.

(c.) Asking him whether he is guilty or not of the offense charged.

The former practice of requiring him to hold up his hand for the purpose of identification is now generally disused, unless it be adopted in order to distinguish between two or more prisoners who are being arraigned at the same time. Nor is the prisoner now asked how he will be tried, it being taken for granted that he will be tried by a jury. He is to be brought to the bar without irons, or any manner of shackles or bonds, unless there is evident danger of escape. In felonies he must be placed at the bar of the court, though in misdemeanors this does not seem necessary.(b) If several defendants are charged in the same indictment, they ought all to be arraigned at the same time. It is usual,

(z) 14 and 15 Vict., c. 100, § 27. (a) *Ad rationem—ad reson—a reen.*

(b) R. *v.* Lovett, 9 C. & P. 462.

(1) In Kentucky there is no arraignment in misdemeanors, and it may be waived by the defendant in felonies. In cases of misdemeanor, the defendant offers his motion, demurrer, or plea when the case is called for trial. Crim. Code, §§ 155, 157.

for convenience's sake, to arraign several prisoners immediately in succession, and then proceed to the trial of one, the rest being put down for the time.

The indictment having been read to the prisoner, the clerk of arraigns, or clerk of the peace, or other proper officer of the court, demands of him, "How say you, John Styles, are you guilty or not guilty?" One of three courses will then be taken by the prisoner. He will either [move to quash the indictment, or demur, or]

(a.) Stand mute. (b.) Confess, or say that he is guilty. (c.) Plead.

Standing mute, that is, not answering at all, or answering irrelevantly. In former times, if, in cases of felony, this standing mute was obstinate, the sentence of *peine forte et dure* followed;(*c*) in treason and misdemeanor the standing mute was equal to a conviction. Later, in every case it had the force of a conviction.(*d*) If the prisoner was dumb *ex visitatione Dei*, the trial proceeded as if he had pleaded not guilty. But now, if the prisoner stands mute of malice, or will not answer directly to the indictment or information, the court may order the proper officer to enter a plea of not guilty on behalf of such person; and the plea so entered has the same force and effect as if the person had actually so pleaded.(*e*) If it is doubtful whether the muteness be of malice or *ex visitatione Dei*, a jury of any twelve persons present may be sworn to discover this. If they find him mute of malice, 7 and 8 George 4, c. 28, will apply; if mute *ex visitatione Dei*, the court will use such means as may be sufficient to enable him to understand the charge and make his answer; or, if this be found impracticable, a plea of not guilty will be entered, and the trial proceed.

In the event of a doubt arising as to the sanity of a prisoner at the time of his arraignment, a jury will be sworn to ascertain the state of his mind. If they find him insane, so that he can not be tried on the indictment, it is lawful for the court before whom he is brought to be arraigned

(*c*) v. Reeves' Hist. of Eng. Law, ii. 134, iii. 133, 250, 418.
(*d*) 12 Geo. 3, c. 20. (*e*) 7 and 8 Geo. 4, c. 28, § 2.

to direct such finding to be recorded, and thereupon to order such person to be kept in strict custody, until her majesty's pleasure be known. If he does not seem able to distinguish between a plea of guilty and not guilty, this is enough to justify the jury in finding him of unsound mind. So, also, if he has not sufficient intellect to comprehend the course of proceedings, so as to make a proper defense, and challenge jurors, and the like.(*f*) It will be remembered that, although the prisoner was sane when the crime was committed, if he appears to be insane at the time of arraignment (or, indeed, at any subsequent period), the trial will be deferred until he has recovered his reason.(*g*)

We may notice here that no trial for felony can be had, except in the presence of the prisoner. But, in cases of misdemeanor, after the prisoner has pleaded, the trial may go on, though he is not present. Thus, in a recent case of perjury, when the defendant took ill, the trial proceeded during his temporary absence.(*h*) In indictments or informations for misdemeanor, in the queen's bench, the accused may appear by attorney.(1)

(*f*) R. *v.* Pritchard, 7 C. & P. 303.

(*g*) v. 39 and 40 Geo. 3, c. 94, § 2. R. *v.* Berry, 34 L. T. (N. S.) 590. Insanity at the time of the commission of the crime is quite another consideration, and is treated of elsewhere. v. p. 23.

(*h*) R. *v.* Castro.

(1) It was held in Ohio and Indiana, that the presence of the accused at his trial for a felony is a personal right which he may waive, and, if he voluntarily absents himself, the trial may proceed, and verdict be rendered in his absence. Fight *v.* State, 7 Ohio (pt. 1), 180; McCorkle *v.* State, 14 Ind. 39; 16 Ind. 537.

But the contrary is the prevalent rule. State *v.* Hurlburt, 1 Root, 90; People *v.* Perkins, 1 Wend. 91; Prine *v.* Commonwealth, 6 Harris (Pa.), 103; State *v.* Hughes, 2 Ala. 102; Cole *v.* State, 5 Eng. 318; Clark *v.* State, 4 Humph. 254; Nomaque *v.* People, Breese, 109; People *v* Kohler, 5 Cal. 72.

It is now provided by statute, in Ohio, that if the defendant escapes or forfeits his recognizance after the jury are sworn, the trial shall proceed and th · verdict be received and recorded; if the trial is for misdemeanor, the sentence shall also be pronounced in his absence, but, if for felony, the case shall be continued until the convict appears in court or is retaken. 74 Ohio L. 350. The Kentucky criminal code, § 183, has the same provision as to the trial of felonies, except that in

CONFESSION.

If the accused makes a simple, unqualified confession that he is guilty of the offense charged in the indictment, if he adheres to this confession, the court has nothing to do but to award judgment, generally hearing the facts of the case from the prosecuting counsel. But the court usually shows reluctance to accept and record such confession, in cases involving capital or other great punishment; often it advises the prisoner to retract the confession, and plead to the indictment. The reason of this is obvious—the defendant may not fully understand the nature of the charge, he may be actuated by a morbid desire for punishment, etc. When the prisoner has pleaded guilty, and sentence has been passed, he can not retract his plea and plead not guilty.(*i*) On the other hand, a prisoner who has pleaded not guilty, may, by leave of the court, on the advice of his counsel, or otherwise, withdraw that plea and plead guilty.(*j*)

A free and voluntary confession, by the defendant, before the magistrate, if duly made and satisfactorily proved, is sufficient to warrant a conviction, without further corroboration; but, of course, the whole of the confession must be taken into account, the part favorable to the prisoner as well as that against him. This confession, as also any free or voluntary confession made to any other person, is merely evidence (though, if undisputed, no other evidence may be needed), and is to be widely distinguished from the confession in court or plea of guilty.

In connection with this subject, we must advert to the case of one of several codefendants turning *queen's evidence.* When sufficient evidence of a felony can not be obtained

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such case it is at the option of the prosecuting attorney whether the trial shall proceed or not. The statute of Indiana provides that no person, prosecuted for an offense punishable by death or imprisonment, shall be tried unless personally present during the trial. Act of 1852, in Rev. Stat. (1876), pp. 397, 398. The Illinois statute leaves the rule as at common law. In Iowa and Michigan, the statute provides that no person indicted for felony shall be tried unless personally present.

(*i*) R. *v.* Sell, 9 C. & P. 346. (*j*) v. R. *v.* Brown, 17 L. J. (M. C.) 145.

from other quarters, and when it is perceived that the testimony of one of the accused would supply this defect, it is usual for the committing magistrate to hold out hope to this one that, if he will give evidence so as to bring the others to justice, he himself will escape punishment. The approval of the presiding judge will have to be obtained.(*k*) Even during the trial, it sometimes happens that the counsel for the prosecution, with the consent of the court, when such a course is necessary to secure a conviction, takes one of the defendants out of the dock, and puts him in the witness-box—such prisoner, of course, obtaining a verdict of acquittal.(*l*) But, as we shall see hereafter more fully, the evidence of an accomplice is to be regarded with suspicion, and requires corroboration.(*m*)

(*k*) R. *v.* Rudd, 1 Leach, 115. (*l*) R. *v.* Rowland, Ry. & M. 401.
(*m*) v. p. 350.

CHAPTER XI.

PLEAS.

If the defendant neither stands mute nor confesses, he pleads—that is, he alleges some defensive matter. The learning on the subject of the different pleas has become, to a great extent, a matter of history rather than of practice, on account of the comprehensive character of the plea of the general issue of not guilty, and also on account of the right to move in arrest of judgment. The following are the names of the pleas, in the order in which they should be pleaded:

i. Plea to the jurisdiction.
ii. Plea in abatement.
} Termed "*dilatory* pleas."

iii. Special pleas in bar.
  (a.) Autrefois acquit.
  (b.) Autrefois convict.
  (c.) Autrefois attaint.
  (d.) Pardon.

iv. General issue of not guilty.

Each of these will be considered separately. In the next chapter, *Demurrers* will be noticed. These, Blackstone treats as pleas, whereas, in truth, they are rather in the nature of objections that there is not sufficient case in point of law to oblige the accused to plead.

It is not to be understood that a defendant may, in turn, go through the whole of these pleas, resorting to the subsequent plea as a previous one fails. The rule is that not more than one plea can be pleaded to an indictment for misdemeanor, or a criminal information. In felonies, if the accused pleads in abatement, he may afterward, if the plea is adjudged against him, plead over to the felony, that is, plead the general issue of not guilty.

i. *Plea to the jurisdiction.*—When an indictment is taken before a court which has no cognizance of the offense,

the defendant may plead to the jurisdiction, without answering at all to the crime alleged. This want of jurisdiction may arise either from the fact that the offense was not committed within the district of the jurisdiction, for example, if a person be indicted in Kent for stabbing a person in Sussex; or because the tribunal in question has not cognizance of that class of crimes, for example, if a person be indicted at the sessions for murder.

But this plea is very seldom resorted to, inasmuch as relief can be obtained in other ways. Thus the objection that the offense was committed out of the jurisdiction may generally be urged under the general issue, or, in certain cases, by demurrer, or by moving in arrest of judgment, or by writ of error. If the objection is that the crime is not cognizable in a court of that grade, though committed within the jurisdiction, the defendant may demur, or have advantage of it under the general issue, or by removing the indictment to the queen's bench division and there quashing it.

The clerk of the peace or of the arraigns may make *replication*, showing that the offense is triable by the court. And to this the defendant may rejoin.(*n*)

ii. *Plea in abatement.*—This is another dilatory plea, formerly principally used in the case of the defendant being misnamed in the indictment; for example, if a wrong Christian name or addition were given. But even if the defendant was successful on this plea, a new bill of indictment with the correction might at once be framed. The plea is now, however, virtually obsolete. It has been enacted that no indictment or information shall be abated by reason of any dilatory plea of misnomer, or of want of addition, or of wrong addition, if the court be satisfied of the truth of the plea. The court will cause the indictment or information to be amended, and will call upon the party to plead thereto, and will proceed as if no such dilatory plea

(*n*) This pleading is done out of court, and must be distinguished from the objections taken under the general issue by the prisoner in court.

had been pleaded.(*o*) And no indictment is to be held insufficient for want of, or imperfection in, the addition of any defendant.(*p*)

[A motion to quash the indictment was, at common law, addressed to the discretion of the court, and courts differed in their practice as to the cases in which the motion should be granted and as to the stage of the proceeding at which it could be presented. In general, this motion could be properly presented as a speedy means of disposing of the indictment where the indictment for defect in substance was bad on general demurrer; but where the indictment was for a grave offense, a motion made on this ground would be overruled, unless the defect were obviously clear; 2. Where the indictment was defective in form, in which case the motion was a substitute for a special demurrer; 3. For fatal irregularity in the record other than the face of the indictment; 4. It was also allowed by some courts for irregularity in the proceedings not appearing on the record, in which case the motion filled the place of a plea in abatement. It must ordinarily be presented before issue joined, but was in a proper case allowed after issue joined.(1) In such case, it has been been held by some courts, the plea should be withdrawn before the motion to quash can be received.(2)

The practice has been reduced to certainty in most states by statute. In Ohio, a motion to quash may be made in all cases when there is a defect apparent upon the face of the record, including defects in the form of the indictment, or in the manner in which the offense is charged. A plea in abatement may be made when there is a defect in the record which is shown by facts extrinsic thereto. The accused shall be taken to have waived all defects which may be excepted to by a motion to quash, or a plea in

(*o*) 7 Geo. 4, c. 64, § 19.

(*p*) 14 and 15 Vict., c. 100, § 24. We have already adverted to the large powers of amendment which are given to the court by this statute.

(1) Commonwealth *v.* Chapman, 11 Cush. 422; Regina *v.* Heane, 9 Cox C. C. 433.

(2) Nicholls *v.* State, 2 South. 539.

abatement, by demurring to the indictment, or pleading in bar or the general issue.(1)

In Kentucky, a "motion to set aside the indictment" can be made only on the following grounds: 1. A substantial error in the summoning or the formation of the grand jury. 2. That some person other than the grand jurors was present before the grand jury when they acted upon the indictment. 3. That the indictment was not found and presented as required by the code.(2)

In Indiana, the court may quash an indictment on motion when it appears upon its face either: 1. That the grand jury had no legal authority to inquire into the offense charged. 2. That the facts stated do not constitute a public offense. 3. That the indictment contains any matter which, if true, would constitute a legal justification of the offense charged, or other legal bar to the prosecution.(3)

In Illinois, all exceptions which go merely to the form of an indictment, shall be made before trial, and no motion in arrest of judgment or writ of error shall be sustained, for any matter not affecting the real merits of the offense charged in the indictment. No indictment shall be quashed for the want of the words "with force of arms," or of the occupation or place of residence of the accused, nor by reason of the disqualification of any grand juror.(4)

In Iowa, a "motion to set aside an indictment" made by the defendant must be sustained: 1. When the indictment is not indorsed "a true bill" by the foreman of the grand jury. 2. When the names of all the witnesses examined before the grand jury are not indorsed on the instrument; also where the minutes of the evidence of the witnesses examined before the grand jury are not returned with it. 3. When it has not been presented and marked "filed" as prescribed by the code. 4. When any person other than the grand jurors was present before the grand jury when the question was taken upon the finding of the indictment,

(1) 74 Ohio L. 341.
(2) Crim. Code, § 158.
(3) Rev. Stat. (1876), p. 399.
(4) Rev. Stat. (1877), p. 403

or when any person other than the grand jurors was present before the grand jury during the investigation of the charge, except as required or permitted by law. 5. That the grand jury were not selected, drawn, summoned, impaneled, or sworn as prescribed by law. A motion made on the ground of error in the indorsement of the names of witnesses will be overruled if the error is corrected. As a person "held to answer," that is, committed or bound over by a magistrate after a preliminary examination, has under the code the right to challenge the array of the grand jury or any member of it, no such person is allowed to base his motion on the fifth ground.(1)

In Michigan, no indictment shall be quashed: 1. For the omission or misstatement of the occupation, estate, or degree of the defendant, or of the name of the city, township, or county of his residence. 2. For the omission of the word "feloniously" or of the words "with force and arms," or any words of similar import. 3. For omitting to charge any offense to have been committed contrary to the form of the statute or statutes. 4. For any other defect or imperfection in matters of form, which shall not tend to the prejudice of the defendant.(2) It is also provided that every objection to any indictment for any formal defect apparent on the face thereof, shall be taken by demurrer or motion to quash before the jury shall be sworn; and the court may, if it be thought necessary, cause the indictment to be forthwith amended in such particular, and thereupon the trial shall proceed as if no defect had appeared.(3)

When the motion to quash is granted, the court, in Kentucky, must, and in Ohio and Iowa may, commit the defendant, or admit him to bail, that the charge may be again submitted to the grand jury, if in session, or to another, if it is already discharged.]

iii. *Special pleas in bar.*—These are termed "special" to distinguish them from the general issue; and "in bar" because they show reason why the defendant ought not to

(1) Rev. Stat. (1873), p. 674. (2) Rev. Stat. (1871), pp. 2169, 2170.
(3) Ibid., p. 2172.

answer at all, nor put himself upon his trial for the crime alleged, and thus they are distinguished from dilatory pleas which merely postpone the result.

All matters of excuse and justification may be given in evidence under the general issue; therefore it is hardly ever necessary to resort to a special plea in bar, except in the four cases to be examined more in detail.(*q*)

If judgment on a special plea in bar is given against the defendant in a felony, it is to the effect that he make further answer (*respondeat ouster*); but as he generally pleads, at the same time, the general issue, when such judgment is given against him the jury proceed to inquire into his guilt, as if the special plea had not been pleaded. If the plea is established in his favor he is discharged. In misdemeanors the judgment is final, so that if it is against the defendant he is considered guilty of the offense; if for him, he is discharged.

(a.) *Autrefois acquit.*—When a person has been indicted for an offense and regularly acquitted, he can not afterward be indicted for the same offense, provided that the indictment were such that he could have been lawfully convicted on it. It is against the policy of the English law that a man should be put in peril more than once for the same offense. And, therefore, if he is indicted a second time, he may plead *autrefois acquit*, and thus bar the indictment. It is frequently a difficult matter to determine whether the second indictment bears such a relation to the first, that the latter is a bar to the former. The true test seems to be this: Whether the facts charged in the second indictment would, if true, have sustained the first.(*r*) An acquittal for murder may be pleaded in bar of an indictment for manslaughter, and *vice versa*. So with larceny and embezzlement; robbery, and assault with intent to rob; felony,

(*q*) "In fact, the only instance in which a special plea in bar seems requisite in criminal cases is, where a parish or county is indicted for not repairing a road or bridge, etc., and wishes to throw the onus of repairing upon some person or persons not bound of common right to repair it."—Arch. 135.

(*r*) R. *v.* Vandercomb, 2 Leach, 708.

and an attempt to commit the felony. But an acquittal for larceny is no bar to an indictment for false pretenses; nor will an acquittal as accessory bar an indictment as principal, and *vice versa*. Nor, again, is an acquittal on a charge of stealing "certain goods" on the ground that such goods are a fixture in a building, a bar to an indictment for stealing the fixture (*r*).

The prisoner must satisfy the court: first, that the former indictment, on which an acquittal took place, was sufficient, in point of law, so that he was in jeopardy upon it; [and he must satisfy the jury] secondly, that, in the indictment, the same offense was charged, for the indictment is in such a form as to apply equally to several different offenses: (*s*) [thirdly, of his identity with the defendant in the former prosecution]. To prove his acquittal he may obtain a certificate thereof from the officer or deputy having custody of the records of the court where the acquittal took place (*t*).

(b). *Autrefois convict.*—A former conviction may be pleaded in bar of a subsequent indictment for the same offense; and this, whether judgment were given or not. The same rules as in the plea of *autrefois acquit* generally apply; thus there is the same test as to the identify of the crime.

[The plea of former conviction need not aver that judgment was rendered on the verdict; for, if judgment were so rendered, the appropriate plea was formerly, when the forms were established, *autrefois attaint;* and, if the verdict of guilty had been set aside, that was matter for replication by the prosecution. There would seem to be as good reason for holding a plea of former acquittal sufficient, without averring judgment thereon; for a verdict of acquittal is a finality—it operates as a discharge of the accused, and judgment thereon is a matter of course. The English rule, however, is that the plea of former acquittal should aver judgment on the verdict.(1) But in the United States, it

(*r*) R. *v.* O'Brien, 46 L. T. N. S. 177.

(*s*) Parke, B., in R. *v.* Bird, 2 Den. 94, 98; [Bainbridge *v.* State, 30 Ohio St. 264; State *v.* Small, 51 Mo. 197.]

(*t*) 14 and 15 Vict., c. 99, § 13.

(1) 2 Hale P. C. 243; Rex *v.* Sheen, 2 C. & P. 634, where the form of the plea is commended by the court.

is generally held that judgment need not be averred in a plea of former acquittal.(1)

The constitution of the United States provides that no person shall be subject, for the same offense, to be twice put in jeopardy of life or limb. The equivalent provision in the state constitutions is more commonly in the form that no person shall be put in jeopardy twice for the same offense. In Iowa, it is: No person shall, after acquittal, be tried for the same offense. Jeopardy begins when the trial jury is sworn. If, after that, without assent of the defendant, the prosecuting attorney enters a *nolle prosequi*, or the court, without sufficient cause, discharges the jury, the effect is the same as an acquittal; the defendant is finally discharged, and can not be tried again. The defense of "once in jeopardy" is therefore broader than the strict plea of "former acquittal." Forms of plea in such case are given in Wharton's Precedents, Form 1157, and 1 Bishop on Criminal Procedure, § 585. Such defense and forms, however, are undoubtedly included in the general designation, "plea of former acquittal."

"Legal jeopardy does not arise, if the court has no jurisdiction of the offense. Commonwealth *v.* Peters, 12 Metc. (Mass.) 387; Commonwealth *v.* Goddard, 13 Mass. 455; People *v.* Tyler, 7 Mich. 161.

"Nor is such party put in legal jeopardy, if it appears that the first indictment was clearly insufficient and invalid. Commonwealth *v.* Bakeman, 105 Mass. 53; Gerard *v.* People, 3 Ill. 362; People *v.* Cook, 10 Mich. 164; Mount *v.* Commonwealth, 2 Duv. (Ky.) 93.

"Nor if, by any overruling necessity, the jury are discharged without a verdict. United States *v.* Perez, 9 Wheat. 579; People *v.* Goodwin, 18 Johns. 187; Commonwealth *v.* Bowden, 9 Mass. 494; Commonwealth *v.* Purchase, 2 Pick. 521.

"Nor is such party put in legal jeopardy, if the term of court, as fixed by law, comes to an end before the trial is

(1) *Dictum* in State *v.* Elden, 41 Maine, 185; State *v.* Benham, 7 Conn. 414; West *v.* State, 2 Zabrisk. 212; State *v.* Novell, 2 Yerg. 24; Mount *v.* State, 14 Ohio, 295.

finished. State *v.* Brooks, 3 Humph. 70; State *v.* Mahala, 10 Yerg. 532; State *v.* Battle, 7 Ala. 259; In re Robert Spier, 1 Dev. & Bat. Law, 491; Wright *v.* State, 5 Ind. 290.

"Nor if the jury are discharged before verdict, with the consent of the accused, expressed or implied. State *v.* Slack, 6 Ala. 676.

"Nor if the verdict is set aside on motion of the accused, or on writ of error based on his behalf. State *v.* Redman, 17 Iowa, 329.

"Nor in case the judgment is arrested on his motion. People *v.* Casborus, 13 Johns. 351."(1)

To this may be added, as perhaps not included, nor if the jury is discharged, after considering the cause for such a length of time as to leave no reasonable expectation that they will be able to agree upon a verdict.(2)

A former acquittal or conviction will not be a defense, if it was procured by the fraud of the defendant.(3)

If the former indictment was so defective that judgment might have been reversed, yet, if the judgment has been executed and performed, the plea of former conviction will prevail.(4)

When one act constitutes two distinct offenses, a conviction of one offense is not a bar to a subsequent indictment for the other offense. As, where the same acts constitute the offense of keeping a tippling-shop, and the distinct offense of being a common seller of intoxicating liquors.(5) So, it has been held a conviction of being a common seller of intoxicating liquors is not a bar to an indictment for a single illegal sale during the time embraced in the first indictment(6)—though the contrary has been held.(7)

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(1) Clifford, J., in Coleman *v.* Tennessee, 97 U. S. 509–521.

(2) Dobbins *v.* State, 14 Ohio St. 493.

(3) Commonwealth *v.* Alderman, 4 Mass. 477; State *v.* Little, 1 N. H. 257; State *v.* Reed, 26 Conn. 202; Commonwealth *v.* Jackson, 2 Va. Cases, 501; State *v.* Colvin, 11 Humph. 599; State *v.* Epps, 4 Sneed, 552; State *v.* Green, 16 Iowa, 239; State *v.* Cole, 48 Mo. 70.

(4) Commonwealth *v.* Loud, 3 Metc. (Mass.) 328.

(5) State *v.* Inness, 53 Maine, 536; Commonwealth *v.* McShane, 110 Mass. 502.

(6) State *v.* Maher, 35 Maine, 225. (7) State *v.* Nutt, 28 Ver. 698.

Where one, at the same time, by the same act, passed several forged checks, or stole several articles, only a single offense was committed; and a conviction, upon a charge of passing one of the checks, or stealing one of the arti cles, is a conviction of that offense, and is a bar to any other indictment for passing or stealing the rest.(1)

The true test is whether the evidence necessary to support the second indictment would have been sufficient to prove a legal conviction in the first.(2)

A defendant may be found guilty either of the whole of the offense as charged in the indictment, or of any less offense included therein. Hence, if found guilty of the whole offense charged, he can not be subsequently convicted of any less offense charged therein. And, if he is indicted for an offense, and convicted, and should thereafter be indicted for a greater offense, including the one for which he has been convicted, he could not be found guilty, without being convicted again of the same offense of which he has already been convicted. But this is limited by another rule. It was the rule that one could not, under an indictment for felony, be convicted of a misdemeanor; and if, upon trial for a misdemeanor, the evidence should prove a felony including the misdemeanor, the practice was to discharge the defendant, and have him indicted for the felony. And, though this rule and this practice are now generally abrogated in the United States, it is still generally held that a defendant indicted for a felony can not plead in bar a previous conviction, under an indictment or charge of misdemeanor, for the same transaction. It is held that a conviction for simple assault and battery is not a bar to an indictment for assault with intent to kill and murder,(3) an assault with a deadly weapon,(4) an assault with intent

(1) State *v.* Egglescht, 41 Iowa, 574; Ben. *v.* State, 22 Ala. 91; Fisher *v.* Commonwealth, 1 Bush, 211; Clem *v.* State, 42 Ind. 420; Black *v.* State, 38 Ga. 187; Lorton *v.* State, 7 Mo. 55.

(2) Price *v.* State, 19 Ohio, 423.

(3) State *v.* Hattabaugh, Supreme Court of Indiana, May Term 1879, Cent. Law J., August 1, 1879.

(4) Severin *v.* People, 37 Ill. 414.

to do great bodily injury,(1) or to an indictment for murder(2) or manslaughter.(3) In State *v.* Hattabaugh, the court say: A conviction or acquittal of a simple assault and battery can not be pleaded in bar to a subsequent prosecution for the same assault and battery with intent to commit a felony; but it can be put in evidence, so that, if the jury should fail to find the felonious intent, they can not convict again of the simple assault and battery.]

(c.) *Autrefois attaint.*—Formerly when a person was attainted, as long as the attainder was in force he was considered legally dead. Therefore a plea of an already existing attainder was a bar to a subsequent indictment for the same or for any other felony, on the ground that such second prosecution of a person already dead, and whose property had been forfeited, would be useless. But now an attainder is no bar unless the attainder be for the same offense as that charged in the indictment,(*x*) so that practically the plea of *autrefois attaint* is a thing of the past.

(d.) *Pardon.*—A pardon may be pleaded not only in bar to the indictment (as in the case of the three pleas just noticed), but also after verdict in arrest of judgment; or, after judgment, in bar of execution. But it must be pleaded as soon as the defendant has an opportunity of doing so; otherwise he will be considered to have waived the benefit of it. The subject will find a more convenient place hereafter.(*y*)

iv. *The general issue of not guilty.*—When the prisoner, on being charged with the offense, answers *viva voce*, at the bar, "not guilty," he is said to plead the general issue. The consequence is, that he is to be tried by a jury, or, as it is frequently stated, he puts himself upon the country for trial. The plea is recorded by the proper officer of the court, either by writing the words "*po. se.*" (*posuit se super patriam*), or at the central criminal court by the word "*puts.*"

(*x*) 7 and 8 Geo. 4, c. 28, § 4. (*y*) v. p. 416.

(1) State *v.* Foster, 33 Iowa, 525.

(2) Commonwealth *v.* Roby, 12 Pick. 496.

(3) Burns *v.* People, 1 Parker Crim. Ca. 182.

This is much the most common and advantageous course for the prisoner to take; unless, indeed, he pleads guilty, and thereby the court is induced to take a more lenient view of his case. Pleading the general issue does not necessarily imply that the prisoner contends that he did not do the actual deed in question, inasmuch as it does not prevent him from urging matter in excuse or justification. More, this is practically the only way in which he can urge matter in excuse or justification. Thus, on an indictment for murder, a man can not plead that the killing was done in his own defense against a burglar; he must plead the general issue—not guilty—and give the special matter in evidence. The pleading of the general issue lays upon the prosecutor the task of proving every material fact alleged in the indictment or information; while the accused may give in evidence any thing of a defensive character.

Issue.—When the prisoner has pleaded not guilty, the record is made up, both parties being brought to an issue, and both putting themselves upon their trial by jury. The general issue appears on the record: "*And the said John Styles forthwith being demanded concerning the premises in the said indictment above specified and charged upon him, how he will acquit himself thereof, saith that he is not guilty thereof.*" And on the part of the prosecution the *similiter* is then added: "*And John Brown* (the clerk of the arraigns, or clerk of the peace) *who prosecutes for our said lady the queen in this behalf, doth the like. Therefore let a jury come,*" etc.(*z*)

(*z*) For other ceremonies formerly observed, and the origin of the term "culprit," etc., v. 4 Bl. 339, or 4 St. Bl. 406, n.

CHAPTER XII.

DEMURRER.

A DEMURRER is an objection on the part of the defendant who admits the facts alleged in the indictment to be true, but insists that they do not in point of law amount to the crime with which he is charged. Thus, if a person is indicted for *feloniously* stealing goods which are not the subject of larceny at common law or by statute, he may demur to the indictment, denying it to be a felony. It is for the court, on hearing the arguments, to decide whether the objection be good. The following is the form of a demurrer:

> "*And the said John Styles in his own proper person cometh into court here, and, having heard the said indictment* (or *information*) *read, saith, that the said indictment* (or *information*) *and the matters therein contained, in manner and form as the same are above stated and set forth, are not sufficient in law, and that he the said J. S. is not bound by the law of the land to answer the same; and this he is ready to verify: wherefore, for want of a sufficient indictment* (or *information*) *in this behalf, the said J. S. prays judgment, and that by the court he may be dismissed and discharged from the said premises in the said indictment* (or *information*) *specified.*"

If on the demurrer judgment is given *for* the defendant, it is to the effect that he be discharged, provided that the objection be a substantial one; that the indictment be quashed, if it is a merely formal one. If judgment is given *against* the defendant, in felonies the judgment is final; in misdemeanors it is final, unless the court should afterward permit the defendant to plead over.(*a*)

(*a*) This seems to be the state of the law as settled in R. v. Fader

Demurrers in criminal cases seldom occur in practice. Not only is there the risk of having final judgment against the defendant, but the same objections may be brought forward in other and safer ways. In cases of defects in substance apparent on the face of the indictment, generally the defendant may, instead of demurring, plead not guilty, and then, if convicted, move in arrest of judgment. Thus he has a double chance of getting off, first on the facts of the case, then on the point of law. But this course can not be taken when the defect in the indictment is cured by verdict.(*b*)

Formerly there was another kind of demurrer besides the general demurrer to which we have been referring, namely, a special demurrer, usually termed a "demurrer in abatement." This was founded on some formal defect in the indictment, whereas a general demurrer is founded on some substantial defect. But now no demurrer lies in respect of the defects specified in the 24th section of 14 and 15 Vict., c. 100;(*c*) and demurrers for other formal defects are practically rendered useless by section 25 of the same statute, which provides that every objection to an indictment for any formal defect apparent on the face thereof shall be taken by demurrer or motion to quash the indictment before the jury are sworn, and not afterward; and the court before which such objection is taken for any formal defect may, if it be thought necessary, cause the indictment to be forthwith amended in such particulars, and thereupon the trial will proceed as if no such defect had appeared.

[In Kentucky, where all pleadings subsequent to the indictment are oral, when the defendant says he demurs, the clerk makes an entry on the record, "The defendant demurs to the indictment." A demurrer, there, is proper—

man, 1 Den. 569; 3 C. & K. 353; though some still contend that in felonies, after judgment against the defendant, he may still plead not guilty; and a defendant has been allowed to demur and plead not guilty at the same time.

(*b*) v. 7 Geo. 4, c. 64, § 21. Heymann *v.* R., L. R., 8 Q. B. 105; R. *v.* Goldsmith, L. R., 2 C. C. R. 74; 42 L. J. (M. C.) 94.

(*c*) v. p. 266

1. If it appear from the indictment that the offense was not committed within the local jurisdiction of the court. 2. If the indictment do not substantially conform to the requirements of the code as to its form and structure. 3. If more than one offense be charged in the indictment, except as permitted by the code. 4. If the facts stated do not constitute a public offense. 5. If the indictment contain matter which is a legal defense or bar to the prosecution. If it appear that the offense is a felony, and was committed in some other county in the state, the defendant, together with the indictment and all original papers, is transferred to the county having jurisdiction. If there is an improper misjoinder of offenses, the demurrer will be overruled, upon the prosecuting attorney's dismissing one of the charges. If the demurrer is sustained on the fifth ground, the defendant must be discharged, and judgment entered in his favor. If sustained on any other ground, the indictment may be submitted to another grand jury, and the defendant held meanwhile on bail.(1)

In Iowa, the defendant may demur when it appears upon the face of the indictment either—1. That it does not conform substantially to the requirements of the criminal code. 2. That the indictment contains any matter which, if true, would constitute a legal defense or bar to the prosecution. If the demurrer is sustained on the ground that the offense charged was within the exclusive jurisdiction of another county in the state, the same proceedings are taken as in Kentucky. If sustained on the second ground, the judgment is final, and the defendant is discharged. If sustained on any other ground, the defendant is discharged, unless the court is of opinion the objection can be remedied or avoided in another indictment; in which case, the court may order it to be submitted to another or the same grand jury, the defendant being held meanwhile on bail.(2)

In Michigan, objection for a formal defect appearing on the face of the indictment may be taken by demurrer as well as by motion to quash; and, if sustained, the court

(1) Crim. Code, §§ 164–170. (2) Rev. Stat. (1873), p. 676.

may order the indictment to be forthwith amended, and the case proceed.(1)

In Ohio, the only ground of demurrer allowed by the code, is that the facts stated in the indictment do not constitute a punishable offense, or that the intent is not alleged, when proof of it is necessary to make out the offense charged.(2)

When a demurrer is overruled, it is now generally provided by statute that the defendant shall have leave to plead. It is also provided, in Iowa, that, if he then fails to plead, final judgment may be rendered against him on the demurrer.(3)

TRIAL.

It will not be necessary to describe the various modes of trial which have been long abolished, namely, the ordeal, the corsned, trial by battle.(*d*) The last of these was suppressed by 59 George 3, c. 46, in consequence of a case(*e*) in which the person accused demanded the settlement of the question by a fight.

The only modes of trial which now remain are:

A. Trial of peers in the court of parliament or the court of the lord high steward.

B. Trial by jury (or by the country—*per patriam*)—the trial by his peers, which every Englishman is entitled to claim.(*f*) This, of course, is the ordinary mode of trial, both at the sessions, the assizes, the central criminal court, and the queen's bench division. It is this with which we have now to deal, taking the various steps in their order.

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(1) Rev. Stat. (1871), p. 2172. (2) 74 Ohio L. 341.

(3) Rev. Stat. (1873), p. 676.

(*d*) A full account will be found in the various editions of Blackstone, Hallam's Middle Ages, Reeves' History of English Law, and the other works dealing with the history of the law.

(*e*) Ashford *v.* Thornton, I B. & Ald. 405.

(*f*) *Nullus liber homo capiatur, vel imprisonetur, aut exulet, aut aliquo alio modo destruatur, nisi per legale judicium parium suorum, vel per legem terræ.* Magna Charta.

CHAPTER XIII.

THE PETTY JURY

When the prisoner has put himself upon the country, the petty jurors are called by the clerk to answer to their names. The list which is thus called over is the panel returned by the sheriff.

Who are liable to serve on the petty jury, and how are they returned? The law on this subject is contained chiefly in two statutes—the jury act, 1826,(*g*) and the juries act, 1870.(*h*) The qualification of common jurors is the following: Every man between the ages of twenty-one and sixty, residing in any county in England, who has in his own name, or in trust for him, within the same county, £10, by the year above reprises in lands or tenements, or in rents therefrom, or in such lands and tenements taken together, in fee simple, fee tail, or for the life of himself or some other person, or lands to the value of £20 a year, held by lease for twenty-one years or longer, or for a term of years determinable on any life or lives; or who, being a householder, is rated or assessed to the poor-rate or to the inhabited-house duty, in Middlesex, to the value of not less than £30, or, in any other county, not less than £20; or who occupies a house containing not less than fifteen windows, is qualified to serve on petty juries at the courts at Westminster, in the counties palatine, and at the assizes, and also at both the grand and petty juries at the county sessions.(*i*) Every burgess is qualified and liable to serve on the grand and petty juries at the borough quarter sessions.(*k*)

Certain exemptions from serving on juries are enumerated by the juries act, 1870. The following are amongst those exempted: Peers, members of parliament, clergymen,

(*g*) 6 Geo. 4, c. 50.
(*h*) 33 and 34 Vict. c. 77.
(*i*) 6 Geo. 4, c. 50, § 1.
(*k*) 5 and 6 Wm. 4, c. 76, § 121

Roman Catholic priests, ministers of any congregation of Protestant Dissenters or Jews whose place of meeting is duly registered, provided they follow no secular occupation except that of schoolmaster; those actually practicing in the law as barristers, solicitors, managing clerks, etc.; officers of the law courts, and acting clerks of the peace or their deputies; coroners; jailers and their subordinates, and keepers in public lunatic asylums; physicians, surgeons, apothecaries, pharmaceutical chemists actually practicing; officers of the navy, army, or militia, or yeomanry, if on full pay; pilots; certain persons engaged in the civil service; officers of the police; magistrates to a certain extent; burgesses as regards the sessions of the county in which their borough is situated.(*l*)

These exemptions must be claimed before the revision of the list by the justices.(*m*) Aliens domiciled in England or Wales for ten years or upward may be jurors, if otherwise qualified.(*n*) Convicts, unless pardoned, and outlaws are disqualified.(*o*)

The mode in which the sheriff's list of jurors is prepared is the following: The clerk of the peace of every county, riding, or division, on or before July 20th of each year, issues a precept to the churchwardens and overseers of the poor of the several parishes, and the overseers of the poor of the several townships, requiring them to make out before September 1st a list of persons within their jurisdiction qualified and liable to serve on juries as above. The churchwardens and overseers make out the lists, affixing a copy to every public place of worship on the first three Sundays in September. The justices correct these lists at a special petty sessions held in the last week of September. The lists are then copied by the clerk of the peace into the jurors' book; and this is delivered to the sheriff for use during the ensuing year.(*p*) Before each assizes or sessions

(*l*) 33 and 34 Vict., c. 77, § 9. See also 34 and 35 Vict., c. 103, § 30.
(*m*) Ibid., § 12. (*n*) Ibid., § 8.
(*o*) Ibid., § 10. As to special jurors, v. p. 321.
(*p*) v. 6 Geo. 4, c. 50; 25 and 26 Vict., c. 108; 33 and 34 Vict., c. 77

a precept issues to the sheriff, requiring him to return a competent number of jurors from those whose names appear in the current jurors' book. The *panel* (an oblong piece of parchment) must contain the names of the competent number alphabetically arranged, with their places of abode and additions. The jurors must be summoned six days at least before they are required to attend.(*q*) The names of the petty jurors who attend are registered and each juror may require from the clerk of the peace a certificate of his attendance. This exempts him from liability to serve again as a petty juror at the assizes for one year after he has served as such in Wales, Hereford, Cambridge, Hunts, or Rutland, four years in York, and two years in any other county, and from liability to serve again as a grand or petty juror at the sessions for one year after he has served as such in Wales or one of the four above-named counties, or two years in any other county. In Middlesex a person is exempted from serving as a juror at any sessions of *nisi prius* or jail delivery, if he has served as such in either of the two terms or vacations next immediately preceding.(*r*)

Jurors who have been summoned not attending, and not giving sufficient reason for their absence, and in court having been three times ordered to appear and save their fines, may be fined. Of course, no person who was on the grand jury by which the bill was found can sit upon the petty jury by which it is tried.

The names of the jurors summoned are written on tickets and put into a box. The twelve first drawn out are sworn on the jury, unless absent, excused, or challenged, or unless a previous *view* of some matter connected with the subject in issue has been ordered by the court, in which case the jurors who have had the view are sworn first. The remaining jurors are either ordered by the judge to remain in attendance in case their services should be required, or are allowed to retire until another day, or are released altogether, according to the discretion of the judge.

(*q*) 33 and 34 Vict., c. 77, § 20. (*r*) 6 Geo. 4, c. 50, § 42.

The prisoner or prisoners, for usually a batch of them are brought up at the same time to appear before the jury, are apprised of their right to object to or *challenge* any of the jurors by the clerk of the arraigns or other officer of the court in the following terms: "*Prisoners, these men that you shall now hear called, are the jurors who are to pass between our sovereign lady the queen and you, upon your respective trials* (or, in a capital case, *upon your life and death*); *if, therefore, you, or any of you, will challenge them, or any of them, you must challenge them as they come to the book to be sworn, and before they are sworn, and you shall be heard.*" The twelve jurors are then called by the proper officer. Challenges may be made, not only on behalf of the prisoner, but also on behalf of the crown. They are of two kinds: (a.) For cause; (b.) peremptory. The former are either—

i. To the *array*, when exception is taken to the whole panel.

ii. To the *polls*, when particular individuals are objected to.

i. The *challenge to the array* is an objection to the whole body of jurors returned by the sheriff, not on account of their individual defects, but for some partiality or default in the sheriff or his under-officer who arrayed the panel. It may be either—(a.) A *principal* challedge, which is founded on some manifest partiality, as if the sheriff be the prosecutor or person injured, or be closely connected with such person, or if he has any pecuniary interest in the trial, or be influenced in his return of jurors by the prosecutor or defendant, or if he be counsel, attorney, etc., in the case; or it may be founded on some error on the part of the sheriff. If the cause of challenge is substantiated the court will quash the array. (b.) Challenge for *favor*, in cases where the ground of partality is less apparent and direct, as when one of the parties is tenant to the sheriff.

The challenge to the array ought to be in writing, and must state specifically the ground of objection. How is it to be determined whether it shall take effect? The other

side, prosecution or defense, may either plead to the challenge, traversing or denying its cause, or may demur to it as insufficient. If it is demurred to, the court will decide the demurrer. If the other side pleads to the challenge, two triers are appointed by the court (generally from the jurymen returned), and are sworn and charged to try whether the array is an impartial one. Sometimes it is tried by the coroners, or by others, the mode being left to the discretion of the court.(*s*) If the challenge is found to be well-grounded, a new *venire* is awarded to the coroners; or, if they are interested, to the *elisors* (two clerks of the court, or two persons named by the court and sworn). The return of these elisors can not be questioned.

Though the challenge to the array be determined against the party, he may still have—

ii. A *challenge to the polls*.—This is also either (a) principal; or (b) for favor.

Principal challenges may be subdivided into these:

Propter honoris respectum—where a peer or lord of parliament is sworn on a jury for the trial of a commoner.

Propter defectum—that is, on account of some personal objection, as alienage, infancy, old age, or a want of the requisite qualification.

Propter affectum—where there is supposed to be a bias or prospect of partiality, as on account of the relationship of a juror; or where an actual partiality is manifested, or where a juror has expressed an opinion as to the result of the trial.

Propter delictum—if a person has been convicted of an infamous crime (*e. g.*, treason, felony, perjury, etc.), and has not been pardoned, or has been outlawed.(*t*)

Challenges *for favor* are made when there is reasonable ground for suspicion (as if a fellow-servant be one party), but there is not sufficient ground for a principal challenge *propter delictum*.

The challenge to the polls is generally made orally, and

(*s*) 4 Bl. 353.

(*t*) 34 and 35 Vict., c. 77, § 10.

must be made before the juror has kissed the book, though often the publicity of the matter is avoided by previous intimation of the objection being made to the proper officer, and in such case probably the juror objected to would not be called. How is the validity of the challenge to be determined? If it is a principal challenge, by the court itself; if a challenge for favor, by two jurors who have already been sworn. But if the challenge for favor is of one of the first two jurors, the court appoints two indifferent persons, thence termed "triers," to try the matter; but they are superseded as soon as two are sworn on the jury. Witnesses may be called to support or defeat the challenge, and the person objected to also may be examined, but not asked questions which tend to his discredit. It should be noticed that, as a rule, a person may challenge himself, upon which he may be examined on oath as to the cause. So the sheriff may suggest the objection to his array on the ground of his relationship, etc.

The crown may order any number of persons called as jurors to stand by, and has not to show any cause for excluding them, until the panel has been gone through and it appears that there will not be left enough jurors without those ordered to stand by.(*u*)

So much for challenges for cause, to the number of which there is no limit, and the rules as to which are generally alike, both in criminal and civil cases. But there is another kind of challenge known to the criminal law alone.

Peremptory challenge.—In felonies the prisoner is allowed to arbitrarily challenge, and so exclude, a certain number of jurors without showing any cause at all. He can not claim this right in misdemeanors;(*x*) but it is usual, on application to the proper officer, for him to abstain from calling any name objected to by the prosecution or defend-

(*u*) v. Mansell *v* R., 27 L. J. (M. C.) 4.

(*x*) "It is equally absurd that in the case of a trifling theft, the prisoner should have the right of peremptorily challenging twenty jurors, whilst a man accused of perjury might see his bitterest enemy in the jury box, and be unable to get rid of him as a juror, unless he could give judicial proof of his enmity."—Fitz. St. 106.

ant within reasonable limits; and this course has been sanctioned by the court (*y*)

The defendant may peremptorily challenge to the number of thirty-five in treason, except in that treason which consists of compassing the queen's death by a direct attempt against her life or person.(*z*) In such excepted case, in murder, and all other felonies, the number is limited to twenty.(*a*) If challenges are made beyond the number allowed, those above the number are entirely void, and the trial proceeds as if no such extra challenge had been made.(*b*)

The court itself may take out of the panel the names of any jurors and insert others where such a course is necessary.(*c*)

If a sufficient number of jurors do not appear, or if by means of challenges or exemptions a sufficient number of unexceptionable ones do not remain, either side may pray a *tales*, that is, a supply of *such* men as are summoned upon the panel, in order to make up the deficiency (generally from the bystanders, *tales de circumstantibus*); but this course seems to require a warrant from the attorney-general.(*d*) The usual course, however, at the assizes, is for the judge to order the sheriff to return a new panel *instanter*, without further precept; and at sessions, for the justices to issue a special precept commanding the sheriff to return a sufficient number of jurors immediately.

(*y*) The reasons which Blackstone assigns are: 1. As every one must be sensible what sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another, and how necessary it is that a prisoner should have a good opinion of his jury, the want of which might totally disconcert him; the law wills not that he should be tried by any one against whom he has conceived a prejudice, even without being able to assign a reason for such dislike. 2. Because, upon challenges for cause shown, if the reason assigned prove insufficient to set aside the juror, perhaps the bare questioning his indifference may sometimes provoke a resentment.—4 Bl. 353.

(*z*) 39 and 40 Geo. 3, c. 93.
(*a*) 6 Geo. 4, c. 50, § 29.
(*b*) 7 and 8 Geo. 4, c. 28, § 3.
(*c*) 6 Geo. 4, c. 50, § 29.
(*d*) 2 Hawk., c. 41, § 18; 4 Bl. 355; Arch. 164.

When the jury have once been sworn they can not leave the box without the leave of the court, and then only in company with some officer of the court. If, in consequence of being unable at once to come to a conclusion, they obtain leave to withdraw in order to consider their verdict, they are kept apart from any one, under the charge of an officer, who is sworn not to speak to them (except to ask them whether they have agreed), or suffer any one else to do so. Their verdict will be set aside if they speak with any one interested, or cast lots as to which way they shall decide. In these and other cases of delinquency they may be fined. By leave of the court they may have reasonable refreshment.(*e*) If the trial is adjourned over night in *treason* or *felonies*, the jury retire in custody of the sheriff and his officer, who are sworn to keep them together. In *misdemeanors* they are allowed to go home on engaging not to listen to any thing spoken to them as to the case under trial. If during the trial, before verdict is given, one of the jury dies, or is taken so ill that he is not able to proceed with the trial, or without permission leaves the box,(*f*) the jury is discharged and a new one sworn to try the case. Of course in such an event the remaining eleven may, and most frequently will, be in the new jury.

We have been hitherto referring to *common* juries. But as in civil, so in criminal cases, *special* juries are sometimes summoned. But this is only in misdemeanors, where the record is in the queen's bench division, and only by permission of the court on motion of either the prosecutor or the defendant. The party applying for a special jury must pay the extra fees and expenses, unless the court certifies that it was a proper case to be tried by a special jury. These jurors are taken from a higher class than common jurors, their qualifications being determined by statute.(*g*) The instances of the trial of a criminal case by a special jury are so rare that we need not enter into further particulars.

Another exceptional form of jury was, until lately, some-

(*e*) v. 33 and 34 Vict., c. 77, § 23. (*f*) R. *v.* Wood, 10 Cox, 573.
(*g*) 33 and 34 Vict., c. 77, § 6.

times demanded; a jury *de medietate linguæ*. Formerly, in cases of felony or misdemeanor, but not of treason, an alien might claim his right to be tried by a jury, half of whose number were aliens, or, at least, if not half, as many as the town or place could furnish. But this privilege was taken away by the naturalization act, 1870; (*h*) and now an alien is tried as if he were a natural-born subject.(*i*)

[In some states, as Ohio, Kentucky, and Iowa, the whole subject of challenging is determined in great detail by statute; in others, the grounds for challenge are left substantially as at common law. The challenge on the ground of a previously formed or expressed opinion as to the defendant's guilt has given rise to more decisions in the United States than on all other grounds together. A digest of the decisions may be found in the note to § 771, 1 Bishop's Criminal Procedure. If the proposed juror, in a capital case, has such conscientious scruples against capital punishment that he would not find a verdict of guilty, he must, if challenged, be excluded. When he admits he has a fixed opinion against capital punishment, but does not say he would not find a verdict of guilty, it has been held he should be excluded.(1) And, *contra*.(2) It has likewise been held good ground for challenge that the juror would not render a verdict of guilty on circumstantial evidence;(3) that he does not think the matter charged against the defendant is a crime;(4) that he holds the statute under which the defendant is indicted unconstitutional, and, therefore, would not bring in a verdict of guilty.(5)

An exemption is a privilege of the juror; if he does not choose to claim it, his failure does not give either party ground for challenge.

(*h*) 33 and 34 Vict., c. 14, § 5.

(*i*) We have already referred to another case of so-called jury *de medietate linguæ*, v. p. 300.

(1) O'Brien *v.* People, 36 N. Y. 276; Walker *v.* State, 40 Ala. 325.

(2) Atkins *v.* State, 16 Ark. 568; People *v.* Stewart, 7 Cal. 140; Commonwealth *v.* Webster, 5 Cush. 295.

(3) Gates *v.* People, 14 Ill. 433. (4) Choteau *v.* Pierre, 9 Mo. 3.

(5) Commonwealth *v.* Austin, 7 Gray, 51.

The trial of a challenge for favor by triers is generally abolished by statute, and trial by the court substituted.

Parties may waive their right to challenge. If either party, knowing the existence of ground for challenge, omits to challenge before the juror is sworn, he waives his right to except to the juror on such ground. It is held by some courts that if the party omits to use the means given to him by the law, of ascertaining the juror's competency—if he omits to inquire of the juror or challenge him before he is sworn—it is too late to except to him.(1) In other courts, this is denied or qualified.(2)

If a challenge is erroneously overruled, and the juror is then peremptorily challenged, this is not cause for new trial or reversal, if the challenging party goes to trial without exhausting his peremptory challenges.(3)

In Ohio, where there are several defendants, and there has been no severance, each defendant is entitled to as many peremptory challenges as if he were tried alone.(4) In Kentucky(5) and Iowa,(6) all the defendants constitute one party, and a challenge by any one of them is a challenge by all.

In the various states, statutes ordinarily give the defendant in capital cases a large number (in some, twenty; in others, twenty-three; in Michigan, thirty) of peremptory challenges; and, in all other cases, misdemeanors as well as felonies, a smaller number—in some states, two; in others, three. Generally, the state has a limited number—

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(1) State *v.* Howard, 27 N. H. 171; Stalls *v.* State, 28 Ala. 25; Gillespie *v.* State, 8 Yerg. 507; Beck *v.* State, 20 Ohio St. 228, the principle stated in a civil case, Kenrick *v.* Reppard, 23 Ohio St. 333.

(2) Commonwealth *v.* Wade, 17 Pick. 395; Commonwealth *v.* Flannagan, 7 Watts & S. 515; Thompson *v.* Commonwealth, 8 Gratt. 637, State *v.* Underwood, 6 Ired. 96; Ogle *v.* State, 33 Miss. 383; State *v.* Bunger, 14 La. Ann. 461; Stoner *v.* State, 4 Mo. 368; State *v.* Groome, 10 Iowa, 316.

(3) Nimms *v.* State, 16 Ohio St. 221; Erwin *v.* State, 29 Ohio St. 186; Carroll *v.* State, 3 Humph. 315; State *v.* Elliott, 45 Iowa, 486. But *contra*, Dowdy *v.* Commonwealth, 9 Gratt. 727.

(4) 74 Ohio L. 346. (5) Crim. Code, § 198.

(6) Rev. Stat. (1873), p. 681.

the same in all cases. In some states, the number is three; in some, two. In Illinois, the defendant and the state have alike twenty peremptory challenges in capital cases, ten in cases where the punishment is imprisonment for more than eighteen months, and six in all other cases.(1)

When talesmen are required to fill the jury, the court directs the sheriff to call the required number. The sheriff is not restricted to persons in the court-house.(2) In Ohio, the statute prohibits summoning as talesman any person known to be in the court-house at the time.

In Ohio, either party has the right, when talesmen are needed, to call upon the court to draw up a list of names to constitue a special *venire*.

Under the criminal codes of Kentucky(3) and Iowa,(4) no juror is sworn as such, till twelve are accepted, when the twelve are sworn together. In the absence of statutory regulation, the court may require both parties to make their peremptory challenges, after having exhausted their challenges for cause, to each juror as called, and, upon default, may require the juror to be sworn as such at once, before calling another.(5)]

(1) Rev. Stat. (1877), pp. 405, 406.
(2) State v. Lamon, 3 Hawks (N. C.), 175.
(3) § 217. (4) Rev. Stat. (1873), p. 683.
(5) Schufflin v. State, 20 Ohio. St. 233.

CHAPTER XIV.

THE HEARING.

[A PERSON who is insane, is held incompetent to defend himself. Accordingly, provision is made in most of the states that upon proper suggestion that a person under indictment is insane, all proceedings against him shall be stayed until that question is determined. The determination of that question is not the determination of any question arising under the indictment, for it is the ascertainment of his sanity or insanity at the time the inquiry is made, not his sanity or insanity at the time the offense is charged to have been committed. In Ohio, if suggestion by counsel is made, and the certificate of a respectable physician is presented to the court at any time before sentence, that the defendant is not sane, a jury is impaneled to determine the fact if he is insane, at the time of the impaneling of such jury. If the verdict be that he is not sane, proceedings are stayed until his restoration to sanity; and meanwhile the fact is certified to the probate judge, by whom the defendant is to be dealt with, as if found insane by the probate judge. Upon his restoration, or if he be found sane, the prosecution proceeds.(1) If a convict, sentenced to death, appear to be insane, a like trial is had; if he be found insane, execution is stayed until the governor, convinced that the convict has become of sound mind, shall issue a warrant appointing a time for his execution.(2) There are substantially similar provisions in Kentucky,(3) Illinois,(4) and Iowa.(5)

At any time before the jury is sworn to try the issue, the prosecuting attorney may enter a *nolle prosequi*. This is a

(1) 6t Ohio L. 339.
(2) Ibid., p. 357.
(3) Crim. Code, § 156.
(4) Rev. Stat. (1877), p. 391.
(5) Rev. Stat. (1873), p. 710.

discontinuance of the prosecution, and has the same effect as a dismissal without prejudice in a civil action. But if a *nolle prosequi* is entered after the jury is sworn, it is a dismissal after jeopardy has begun, and is therefore, in effect, an acquittal; a final and conclusive discharge of the defendant.(1) If, however, the indictment is bad, the defendant can not be put in jeopardy by it; and a *nolle prosequi*, after the jury is sworn in such case, is not a bar to a subsequent prosecution by another indictment for the same offense.(2) In Michigan, the prosecuting attorney can not enter a *nolle prosequi* without leave of court.(3) In Indiana, it can not be entered except by the court on motion.(4) In Iowa, the entry of a *nolle prosequi* is abolished; but the court may, on its own motion, or on application of the district attorney, order a dismissal of the prosecution, which dismissal is a bar to another prosecution for the same offense, if it is a misdemeanor, but not if it is a felony.(5)

The constitution of the states, as well as the constitution of the United States, provides, in various phraseology, that the right of trial by jury shall be inviolate. The word jury, as there used, means a jury of twelve men.(6) It was lately held, by the Supreme Court of Iowa, that this provision simply secures a right to the accused, which he can therefore waive in any case, whether misdemeanor or felony.(7) But the prevailing opinion is, that the trial of an issue of not guilty by the court, without the intervention of a jury, is a matter which concerns the jurisdiction of the court as well as the right of the defendant. It is held by some courts, that the defendant can waive trial by jury in cases of misdemeanor,(8) while the contrary is held by

(1) Mount *v.* State, 14 Ohio, 295.

(2) Walton *v.* State, 3 Sneed, 687.

(3) Rev. Stat. (1871), vol. 2, p. 2168.

(4) Rev. Stat. (1876), vol. 2, p. 399. (5) Rev. Stat. (1873), p. 709.

(6) Work *v.* State, 2 Ohio St. 296.

(7) State *v.* Kaufman, decided September, 1879, reported Cent. Law J., October 17, 1879, p. 313.

(8) Commonwealth *v.* Dailey, 12 Cush. 80; Murphy *v.* Commonwealth, 1 Metc. (Ky.) 365; Tyra *v.* Commonwealth, 2 Metc. (Ky.) 1; Williams *v.* State, 12 Ohio St. 622; Darst *v.* People, 51 Ill. 286.

other courts.(1) It is generally held that trial by jury can not be waived in cases of felony.(2) In some cases the ruling is, that trial by jury can not be waived even in cases of misdemeanor, unless the court is authorized by statute to consent to the waiver.(3) And under a statute providing that the defendant and prosecuting attorney, with the assent of the court, may submit the trial to the court, except in capital cases, and all other cases must be by jury, it is held that, in cases other than capital, the trial must be either by the court without the intervention of any jury, or by a jury of twelve men; the defendant's consent will not authorize a trial by ten jurors.(4) And, under a statute authorizing the submission of all cases to the court, the court may, by consent, try a case of murder without the intervention of any jury.(5)]

The full complement of jurors having been obtained, they are sworn; or, if any of them, on conscientious grounds, object to the oath, they make the statutory declaration.(*j*) The oath, and mode of taking it, differ slightly in felonies and in misdemeanors. In felonies, each juror is sworn separately, in the following terms: "*You shall well and truly try, and true deliverance make, between our sovereign lady the queen and the prisoner at the bar, whom you shall have in charge, and a true verdict give according to the evidence. So help you God.*" In misdemeanors, four take hold of the book at the same time, and four, or sometimes all, are sworn together. The oath is: "*You shall well and truly try the issue joined between our sovereign lady the queen and the defendant, and a true verdict give according to the evidence. So help you God.*"(*k*)

(1) Bond *v.* State, 17 Ark. 290; Neales *v.* State, 10 Mo. 498.

(2) Cancemi *v.* People, 18 N. Y. 123; Williams *v.* State, 12 Ohio St. 622; Bell *v.* State, 44 Ala. 393.

(3) State *v.* Maine, 27 Conn. 281; People *v.* Smith, 9 Mich. 193; Hill *v.* People, 16 Mich. 351.

(4) Brown *v.* State, 16 Ind. 496; Allan *v.* State, 54 Ind. 461.

(5) League *v.* State, 36 Md. 257.

(*j*) 30 and 31 Vict., c. 35, § 8.

(*k*) v. Fitz. St., p. 57, as to the historical cause of this distinction, the terms of the oath in a misdemeanor showing the resemblance of pro-

After the jury are sworn, in cases of treason or felony, the crier of the assizes makes the following proclamation: "*If any one can inform my lords the queen's justices, the queen's attorney-general, or the queen's serjeant, ere this inquest taken between our sovereign lady the queen and the prisoners at the bar, of any treason, murder, felony, or misdemeanor, committed or done by them, or any of them, let him come forth, and he shall be heard; for the prisoners stand at the bar on their deliverance.*" The clerk of arraigns or of the peace, having called the prisoner to the bar, says to the jury: "*Gentlemen of the jury, the prisoner stands indicted by the name of John Styles, for that he on the* (reciting the substance of the indictment). *Upon this indictment he has been arraigned, and upon his arraignment he has pleaded that he is not guilty; your charge, therefore, is to inquire whether he be guilty or not guilty, and to hearken to the evidence.*" In misdemeanors, the jury are not thus charged. The counsel for the prosecution now opens the case to the jury, stating the principal facts which the prosecution intend to prove. He then calls his witnesses, who, having been sworn, are examined by him, and then subjected to cross-examination by the counsel for the defense; or, if the prisoner is not defended by counsel, to any questions which the prisoner may put to them. The counsel for the prosecution may re-examine on matters referred to in the cross-examination. The court, also, may, at any time, interpose, and ask questions of the witnesses. After the case for the prosecution is closed, it is ascertained whether the defense intend to call any witnesses. If they do not, the counsel for the prosecution may address the jury a second time in support of his case, for the purpose of summing up the evidence against the prisoner;(*l*) but this right will be exercised only in exceptional cases, as where the evidence materially differs from the counsel's instructions. But if the prisoner

cedure in a misdemeanor to that in a civil action; that in a felony reminding us of the days "when the jury were both judges and witnesses, who reported on the prisoner's guilt or innocence of their own knowledge."

(*l*) 28 Vict., c. 18, § 2.

has witnesses whom he wishes to call, his counsel opens the case for the defense, and calls these witnesses in support thereof. They also are subject to cross-examination by the counsel for the prosecution, and re-examination by the counsel for the defense, on this cross-examination. The counsel for the prisoner is now entitled, at the close of the examination of his witnesses, to sum up his evidence.(*m*)

After this address by the counsel for the defense, the counsel for the prosecution has the right of reply. This is in consequence of the defense having adduced evidence, written or parol, in defense (but mere evidence to character has not, in practice, this result); for if he has not done so, the address of the counsel for the defense is the last. There is, however, one exception. When the attorney-general, or some one else as his representative, is prosecuting, he has the right of reply, although no evidence has been adduced for the defense.(*n*) If two prisoners are jointly indicted for the same offense, and only one calls witnesses, the counsel for the prosecution has the right to reply generally; but not if the offenses are separate, and the prisoners might have been separately indicted.(*o*) If the prisoner is not defended by counsel, he may cross-examine the witnesses for the prosecution and examine his own witnesses, and, at the end of such examination, address the jury in his own defense. And if one only of two prisoners jointly indicted, is defended by counsel, the undefended one may cross-examine and examine as above, and make his statement to the jury before or after the address of the counsel for the other, as the court thinks fit. If the prisoners jointly indicted are defended by different counsel, each counsel cross-examines and addresses the jury in order of seniority at the bar, or, if the judge thinks desirable, in order of the names of the prisoners on the indictment.(*q*) If a prisoner defended by counsel wishes to

(*m*) 28 Vict., c. 18, § 2. (*n*) R. *v.* Toakley, 10 Cox, 406.

(*o*) R. *v.* Jordan, 9 C. & P. 118.

(*q*) Arch. 167. But this point does not seem to be clearly settled R. *v.* Meadows, 2 Jur. (N. S.) 718; R. *v.* Holman, 3 Jur. (N. S.) 722.

address the jury and examine and cross-examine witnesses, he may do so, and his counsel may argue points of law, and suggest questions to him in cross-examination; but he can not have counsel to examine and cross-examine witnesses, and reserve to himself the right of addressing the jury.(r)*

Nevertheless he has sometimes been allowed to do so. In some cases the prisoner, though represented by counsel, has been unconditionally allowed to make a statement.(s) In another case the judge intimated that he would always allow the prisoner to make his own statement, in addition to his counsel's speech, but would at the same time give the prosecution a right of reply.(t) As to the practice of allowing counsel defending a prisoner to make, in his address to the jury, a statement of facts not intended to be proved, it has varied. In one case counsel was not allowed to do so, without giving the prosecution the right to reply.(u) In another and more recent case the late Lord Chief Justice allowed the prisoner's counsel to do so without any such condition, observing that the prisoner's counsel stood in the place of the prisoner, and was entitled to say any thing which the prisoner might say, for which he would be entitled to consideration and credence, if consistent with the rest of the evidence.(v) Relying on this case, Mr. Russell, Q.C., in the trial of O'Donnell, endeavored to do the same thing. The Attorney-General objected, but afterwards withdrew the objection. After this trial a correspondence took place between the Attorney-General and Lord Coleridge, L.C.J., in which the latter states that at a meeting of the judges held in the Queen's Bench room on the 26th November, 1881, the following resolution was come to, viz: "That in the opinion of the judges it is contrary to the administration and practice of the criminal law, as hitherto allowed, that counsel for prisoners should state to the jury, as alleged existing facts, matters which they have been told in their instructions, on the authority of the prisoner, but which they do not propose to prove in evidence.(w)

It will simplify matters if we tabulate the steps in the various cases which may occur.

i. *The prisoner defended by counsel, and adducing evidence in defense.*

Counsel for prosecution opens his case.
Counsel for prosecution examines his witnesses, who may be then cross-examined and re-examined.
Counsel for defense opens his case.
Counsel for defense examines his witnesses, who may be then cross-examined and re-examined.

(r) R. v. White, 3 Camp. 97. * See note p. 340.

(s) R. v. Dyer, 1 Cox, 113; R. v. Manzana, 2 F. & F. 64; R. v. Williams, 1 Cox, 363.

(t) Per Cave, J. in R. v. Lowe, Liverpool Assizes, May, 1882.

(u) R. v. Butcher, 2 Mood. & Rob. 228 (per Coleridge, J.)

(v) R. v. Weston, 14 Cox, 346.

(w) v. the Weekly Notes of the Law Journal, Law Times, etc.

Counsel for defense sums up his case.
Counsel for prosecution replies.

ii. *Prisoner defended by counsel, but not adducing evidence.*
Counsel for prosecution opens his case.
Counsel for prosecution examines his witnesses, who, etc.
Counsel for prosecution sums up his case.(x)
Counsel for defense addresses the jury.

iii. *Prisoner not defended by counsel, but adducing evidence.*
Counsel for prosecution opens his case.
Counsel for prosecution examines his witnesses, who, etc.
Prisoner examines his witnesses, who, etc.
Prisoner addresses the jury.
Counsel for prosecution replies.

iv. *Prisoner not defended by counsel and not adducing evidence.*
Counsel for prosecution opens his case.
Counsel for prosecution examines his witnesses, who, etc.
Prisoner addresses the jury.

[The order of proceeding in the trial in Kentucky is the same as No. 1, above, except that, after the close of the evidence for the defense, the parties may respectively offer rebutting evidence, and also, by leave of court upon good reason, may offer further evidence in their original case; and the court shall, on motion of either party, and before argument to the jury, instruct the jury on the law applicable to the case, which instruction shall always be given in writing.(1)

In Ohio the counsel for the state must first state the case of the prosecution, and may briefly state the evidence by which he expects to sustain it. The defendant, or his counsel, then must state his case, and may briefly state the evidence he expects to offer. The state produces its evidence, and then the defendant offers his. The state will then be confined to rebutting evidence, unless the court, in furtherance of justice, permit it to offer further evidence in chief. If such permission is given, the defendant has the right to offer new evidence in answer to such additional evidence. When the evidence is concluded, either party may request instructions to the jury on points of law, which shall be given or refused by the court, and shall be in writing if either party request it. The argument is begun by the state, then by the defense, and the state concludes. The court then charges the jury, which charge shall be in writing, if either party request it before the argument to the jury is begun.(2)]

The only other proceeding before the jury consider their verdict, is the summing up by the judge, or, at the sessions, by the chairman or recorder. The object of this is to explain the law as applicable to the case under trial, and to marshal the evidence so that it may be more readily understood and remembered by the jury. He first states to them the substance of the charge against the prisoner; he then, if necessary, explains to them the law upon the subject; he next reads the evidence which has been adduced in support

(x) v. p. 334. (1) Crim. Code, §§ 220–225. (2) 74 Ohio L. 349.

of the charge, making, occasionally, such observations as may be necessary to connect the evidence, to apply it to the charge, and to render the whole plain and intelligible to the jury; he then states the defense, and the evidence given on the part of the defendant; and he usually concludes by telling the jury that, if upon considering the whole of the evidence they entertain a fair and reasonable doubt of the guilt of the prisoner, they should give the prisoner the benefit of that doubt, and acquit him.(*t*)

(*t*) Arch. Q. S. 619. In an American case it has been decided that a judge may, when the evidence is clear and uncontradicted, and the character of the witnesses unshaken, tell the jury that it is their duty to convict. Commonwealth *v.* Magee, 12 Cox, 549.

The summing up of the judge "may, and generally does, indicate his opinion, but it is an opinion which is the result of the evidence laid before him, and not as an independent inquiry."—Fitz. St. 161.

[In the United States, the boundary is strictly drawn between the province of the court and the jury. The court decides what is evidence, the jury weighs evidence. If no evidence is offered by the state, or if there is such failure as to any material allegation in the indictment, the court may say, as matter of law, there is nothing for the jury to consider, and may direct the jury to acquit the defendant. But if there is evidence as to every material averment, whether it be slight or cogent, the court must leave it absolutely to the jury to determine its weight. The Pennsylvania case, Commonwealth *v.* Magee, reported in the English series of Cox, and cited above by the author, is against the current of American cases. In Tucker *v.* State, 57 Ga. 503, where the same point arose, it was held error for the court to direct the jury to bring in a verdict of guilty, though the evidence of guilt was overwhelming. Where the evidence consists of the testimony of a single witness, and is, therefore, not contradicted, it is error for the court to direct a verdict of guilty. Huffman *v.* State, 29 Ala. 40. Though the evidence produced by the state may not be contradicted by evidence offered by the defense, yet the jury have the right to consider the credibility of the state's witnesses. Hence there is a distinction between Magee's case and the case of United States *v.* Anthony, 11 Blatchf. 200. There, Hunt, J., held that where all the facts are conceded, are agreed to, and the only contest is as to the legal effect of those facts, there is nothing to submit to the jury, and the court may direct the jury to find a verdict of guilty.

It has been repeatedly held, by the Supreme Court of the United States, that it is the exclusive province of the jury to judge of the weight of evidence. But, in Gaines et al. *v.* Stites, 14 Pet. 322, that

court said: "The principle is well established that a court may give their opinion on the evidence to the jury, being careful to distinguish between matters of law and matters of opinion as to facts." But, generally, in the state courts, such expression of opinion by the court is ground for reversal. It is correct, indeed, to charge, when the testimony is all positive, "if you believe the witnesses, it is your duty to find the defendant guilty." Duffy *v.* People, 5 Parker, 321; 26 N. Y. 588. But it is error to charge, "if you believe the defendant voluntarily confesses his agency in the transaction, you ought to find him guilty," for it is still the province of the jury to find if the confession is in fact true. Butler *v.* Commonwealth, 2 Duvall, 435. It is correct for the court to refuse to charge, "the jury might take into consideration the publicity with which the property had been taken, kept, and sold by the accused, in deciding as to the felonious intent," as giving by the court undue prominence to particular facts. Elswich *v.* Commonwealth, 13 Bush, 155. Where the evidence is conflicting and evenly balanced, an instruction that the remembrance of occurrences nearly a year back, "is not always to be expected of a witness," is erroneous, as bolstering up his testimony. Shaw *v.* People, 81 Ill. 151. It has been held error for the court to instruct the jury, when the wife of the defendant has testified as a witness, "that her testimony should be received with great caution." State *v.* Guyer, 6 Iowa, 264; State *v.* Nash, 10 Iowa, 88; State *v.* Collins, 20 Iowa, 85. For similar rulings as to the abstention required of the court: Commonwealth *v.* Barry, 9 Allen, 276; Walker *v.* State, 37 Texas, 366; Doan *v.* State, 26 Ind. 495; Doering *v.* State, 49 Ind. 56; State *v.* McCanon, 51 Mo. 160; State *v.* Smith, 53 Mo. 267. But it is not error for the court to recite to the jury what is claimed by the parties to be proved, when this is done fairly, done for the purpose only of a proper explanation of the law applicable to the case. Nimms *v.* State, 16 Ohio St. 221.

There was a tendency in the courts to hold that the jury has the right to decide the law as well as the facts in criminal prosecutions. The current has changed, and it is now generally settled that the jury are not judges of the law, but must take the law from the court. People *v.* Bennett, 49 N. Y. 137. It is provided, however, by the constitution in Maryland and Indiana, and by statute in Connecticut, Georgia, and Illinois, that the jury, in criminal cases, is judge of the law as well as of fact. It is accordingly held in Maryland and Indiana, that though the court may instruct the jury as to the law, such instruction is not binding, but only advisory. Wheeler *v.* State, 42 Md. 563; Lynch *v.* State, 9 Ind. 541. In Illinois, it is held correct for the court, after instructing the jury that they are the sole judges of law as well as fact, to add, "it is the duty of the jury to accept and act on the law laid down by the court, unless you can say upon your oaths you are better judges of the law than the court." Mullinix *v.* People, 76 Ill. 211. The rule is substantially the same in Connecticut. State *v.*

Buckley, 40 Conn. 246. While, in Georgia, it is held, notwithstanding the statute, that it is the duty of the jury to take the law from the charge of the court, because it is the only source from which they can properly ascertain it. Habersham *v.* State, 56 Ga. 61.

The court is not required to give instructions in manner and form as asked, but if instructions, the same in substance with those asked, are given, the party asking can not allege error. Bolen *v.* State, 26 Ohio St. 371; State *v.* Donneker, 40 Iowa, 340; State *v.* Woodson, 41 Iowa, 425.]

CHAPTER XV.

THE WITNESSES.

FORMERLY, many more classes of persons were excluded, as incompetent, from giving evidence, than are at the present day. An objection to the testimony of a witness generally operates in another way now. Instead of excluding it altogether, the objection weakens the testimony, and prevents the jury from placing ordinary credit in it, and at the same time giving them the opportunity of gathering therefrom as much truth as possible. Thus, it has been provided by statute that no person offered as a witness shall be excluded by reason of incapacity from *crime* or *interest* from giving evidence;(*u*) two grounds of incompetency which formerly prevailed. However, even now, a person under sentence of death is incapable of giving evidence.(*x*)

The forms of incompetency, at present existing, are:

1. Incompetency of the accused, and the wife or husband.
2. Incompetency from want of understanding.
3. Incompetency on account of the relationship of legal adviser.

Though incompetency from want of religious belief may be regarded as a thing of the past, it is important to notice it.

1. *Incompetency of accused, and the wife or husband.*

It is a general principle of English law that no one is bound to criminate himself (*nemo tenetur prodere seipsum*). In other words, the accused can not be examined as a witness either for the prosecution or the defense. It is obvious that if he were examined as a witness in his own defense, being subjected also to cross-examination by the counsel for the prosecution, he might be compelled to answer questions

(*u*) 6 and 7 Vict., c. 85, § 1. (*x*) R. *v.* Webb, 11 Cox, 133.

which would criminate himself.(y) There are one or two exceptions to this principle. One case referred to is under the Merchant Shipping Act, 1875,(z) where it is provided that one accused of sending an unseaworthy ship to sea may give evidence in the same manner as any other witness, for the purpose of showing that he used all reasonable means to make and keep the ship seaworthy, etc.(a) So also a person charged with buying or receiving arms, equipments, etc., from a soldier, or the husband or wife of such person, may be a witness (b).

[The states have generally enacted that a person indicted shall, at his own request, but not otherwise, be a competent witness; but his neglect or refusal to testify shall not create any presumption against him, nor shall any comment be made upon such neglect or refusal. This provision was not adopted in Iowa,(1) or in the federal courts,(2) till 1878. It has not been adopted in Kentucky. A person has direct knowledge of his own motives and intentions; hence the defendant can testify directly as to his motive and purpose, so far as they are material to the issue.(3) The defendant is competent to testify on his own behalf, under such statutory permission; although, having been previously convicted of felony, he is, by the law of the state, incompent as a witness generally.(4) When a defendant testifies in his own behalf, his cross-examination can be carried to the same extent, and is subject to the same limitations, as the cross-examination of other witnesses.(5)]

(y) The interrogation of prisoners subject to certain provisions, is recommended by Sir James Stephen. See Gen. View Crim. Law, 189, where the whole subject is entered into, and where the system of non-interrogation is shown to be of modern date. The reader will remember that the interrogation of prisoners is one great feature of French criminal procedure.

(z) 38 and 39 Vict., c. 88, § 4; v. p. 147.

(a) The first instance in modern times of a prisoner being examined occurred at the Liverpool Spring Assizes, 1876, when the innovation gave rise to some very severe condemnatory remarks by Mr. Justice Brett.

(b) 42 and 43 Vict., c. 33, s. 149; v. p. 63.

(1) Laws of 1878, c. 168.

(2) Statutes Second Session 45th Congress, p. 30.

(3) Kerrains *v.* People, 60 N. Y. 221; Greer *v.* State, 53 Ind. 420; White *v.* State, 53 Ind. 595.

(4) Newman *v.* People, 63 Barb. 630.

(5) Commonwealth *v.* Lannan, 13 Allen, 563; Commonwealth *v.*

In some cases a wrong-doer is not excused from answering questions on the ground that his answer may tend to criminate himself; but on his making full disclosure he is shielded from all ill consequences; for example, 17 and 18 Vict., c. 38, § 5.

Defendants jointly indicted and given in charge to the jury, and being tried together, can not be called as witnesses for or against each other. But, as we have seen,(*b*) the course is sometimes adopted of applying for an acquittal of one of the codefendants, in order to make him a witness for the prosecution, and the other defendants can not object to this.(*c*) If a second person is indicted with the design of closing his mouth and preventing him from giving evidence, the court may direct his acquittal, if there is no evidence to affect him, or may order him to be tried separately, so that his testimony may be admitted. A defendant who has pleaded guilty may be examined as a witness for or against his codefendants, even before he has received sentence.

[The general provision, in the statutes of the states, is that no person is disqualified as a witness, in a criminal prosecution, by reason of his interest therein as a party or otherwise. The other provision gives the defendant a privilege of declining to be a witness. Any defendant, therefore, can offer himself as a witness on his own behalf, and can consent to be a witness on behalf of, or against, his codefendants The Kentucky code provides, "If two or more persons be jointly indic ed for the same offense, each shall be a competent witness for the others, unless the indictment charge a conspiracy between them."(1) Where separate trials are awarded to parties jointly indicted, each is a competent witness against the other.(2)]

Husband and wife.—In treating of the evidence of a wife,

Mullen, 97 Mass. 545; Farley *v.* State, 57 Ind. 321; People *v.* McGunnigill, 41 Cal. 429; State *v.* Cohn, 9 Nev. 179.

(*b*) v. p. 359

(*c*) R. *v.* Rowland, Ry. & M. 401.

(1) § 234.

(2) Brown *v.* State, 18 Ohio St. 351.

it may be understood that the same rules, *mutatis mutandis*, apply to the evidence of a husband.

The wife can not be a witness for or against her husband. Not only this, but she can not be a witness for any other person indicted jointly with her husband, where her testimony would tend to her husband's acquittal, though only remotely, as, for instance, merely by shaking the evidence of a witness.(*d*) And if several prisoners, jointly indicted, are being tried together, the wife of one of them can not be called as a witness for or against any of the prisoners.(*e*) But to bring the case under this incompetency or exception, the parties must have been actually married; mere cohabitation will not suffice.

[There are three states of case in which a wife can not be a witness for a co-defendant with her husband: First, where her testimony, as in case of conspiracy, would tend directly to the acquittal of her husband; secondly, where, as in the case of an assault, the interests of all the defendants are inseparable; thirdly, where the rights of the husband, though not a party to the suit or prosecution, would be concluded by any verdict therein.(1) But upon the separate trial of one defendant, under a joint indictment against him and several others, charging them with murder, the wives of the latter are competent witnesses to prove an *alibi* for the former.(2) In Iowa, a husband and wife can testify for each other in all cases, but against each other only in a prosecution for a crime committed by one against the other.(3)]

There are two exceptions to this principle, one of which is doubtful.

(a.) In high treason it is said that husband and wife may be witnesses against each other, but no instance can be given.(*f*)

(*d*) R. *v.* Smith, 1 Mood. C. C. 289.

(*e*) R. *v.* Thompson, L. R., 1 C. C. R. 377; 41 L. J. (M. C.) 112

(*f*) v. Rosc. 129. R. *v.* Griggs, T. Raym. 1 (an *obiter dictum*).

(1) Cornelius *v.* Commonwealth, 3 Metc. (Ky.) 481.

(2) Thompson *v.* Commonwealth, 1 Metc. (Ky.) 13; and see State *v.* Burnside, 37 Mo. 343.

(3) Rev. Stat. (1873), § 3636, p. 564, § 3641, p. 565, and § 4556, p. 700.

(b.) In cases of personal injury (*e. g.*, assault) by husband to wife, and *vice versa*.

(c.) In indictments or proceedings for the purpose of trying or enforcing a civil right only.(*d*)

(d.) On proceedings before a court of summary jurisdiction under the Army Discipline Act, 1879, for the offenses of buying from soldiers, or being unlawfully in possession of regimental arms, equipments, etc.(*e*)

(e.) And now under the Married Women's Property Act, in criminal proceedings under that act taken by a husband or wife against the other, he or she is competent to give evidence against the other.(*f*)

In bigamy, of course the so-called second wife is a competent witness; also in forcible abduction and marriage, the marriage here being invalid, the parties may give evidence against each other.

No other relationship entitles to exemption. Parents and children, brothers and sisters, masters and servants may be, and constantly are, called to give evidence for or gainst each other.

2. *Incompetency from want of understanding.*

Generally the same rules which serve to render a person incapable of committing a crime, apply to exclude a person from being a witness. Thus an idiot or a lunatic, unless in an interval of sanity, is incompetent, it being the province of the court to ascertain whether a person is able to understand the nature of an oath and to give evidence. Persons deaf and dumb, or dumb only, may give evidence through an interpreter.

As to children, the rule is somewhat different from that which prevails when the question is whether the child is responsible for its acts. An infant under the age of seven is incapable of committing a crime, but it is competent to give evidence at any age, if it satisfies the test, namely, if it has sufficient intelligence to understand the nature and obligation of an oath.(*g*) The judge frequently, before allowing a child to be sworn, questions it as to its belief in God, knowledge of the consequences of telling a lie, etc.

3. *Incompetency on account of the relationship of legal adviser.*

Counsel, solicitors, and their agents are not obliged, nor are they allowed, without the consent of their clients, to give evidence of communications, written or parol, made to them by their clients in their professional capacity. And it is not material whether the communications were made in the case under trial or not, nor whether the client be a party

(*d*) 40 Vict., c. 14, s. 1; v. p. 440, n.
(*e*) 42 and 43 Vict., c. 33, s. 149; v. pp. 63, 391.
(*f*) 45 and 46 Vict., c. 75, s. 12.
(*g*) v. Fitz. St. 287, as to the evidence of children, though frequently based on imagination, having too much weight, on account of the sympathies of jury.

to the cause. But of course they may be witnesses on points which do not come within the sphere of professional confidential communications; for example, to prove their client's handwriting or his identity. This privilege does not apply to a medical attendant, a conveyancer, a priest, nor indeed to any others than those mentioned above. [In Indiana(1) and Iowa(2) physicians and clergymen, as well as attorneys, are incompetent to testify concerning confidential communications made to them in the course of their profession or the discipline of their church. But this exemption is the privilege of the client, patient, or penitent, and may be waived by him. Ohio has the same provision in the civil code, as has Kentucky, except as to physicians.]

In some cases the court will not compel or allow the disclosure of a particular fact, if such disclosure may be of detriment to the public service, and does not bear directly upon the matter in question; for example, evidence disclosing the channels through which information reaches the government.(*h*)

Incompetency from want of religious belief.(*i*)

Formerly a person who had no religious belief which he deemed binding upon his conscience to speak the truth upon oath could not be a witness. But now this incompetency appears to have been done away with by a recent statute,(*k*) which provides that those who object to taking an oath, or are objected to as incompetent to take an oath, the court being satisfied that the taking of an oath would have no binding effect on their conscience, shall make a promise and declaration, in the prescribed form: "*I solemnly promise and declare that the evidence given by me to the court shall be the truth, the whole truth, and nothing but the truth.*" Any person who, having made this declaration, willfully and corruptly gives false evidence, is liable to be

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(*h*) v Hardy's Case, 24 How. St. Tr. 753.

(*i*) For a full discussion of the question, v. Omichund v. Barker Willes, 538; 1 Smith's Lead. Cas.

(*k*) 32 and 33 Vict., c. 68, § 4.

(1) Rev. Stat. (1876), § 90, p. 395, and act of 1867, inserted p. 132.

(2) Rev. Stat. (1873), § 4556, p. 700, and § 3643, p. 565.

indicted, tried, and convicted as if he had taken an oath. For some time, those who had some religious belief, but who conscientiously objected to oaths, such as Quakers, Moravians, and Separatists, had been admitted as witnesses on their making the statutory form of solemn affirmation or declaration.(*l*)

The form of oath varies according to the creed of the witness. In the case of an ordinary Christian, the witness, holding the New Testament in his bare right hand, is thus addressed by an officer of the court: "*The evidence you shall give to the court and jury, sworn between our sovereign lady the queen and the prisoner at the bar, shall be the truth, the whole truth, and nothing but the truth. So help you God.*" He then kisses the book. Jews are sworn on the Pentateuch, keeping their hats on, the oath concluding with "So help you Jehovah." In the case of others, the form which they consider binding is resorted to; thus, a Chinese may be sworn by means of a cracked saucer.(*m*)

The objection to the competency of a witness should be made before he has been examined in chief, unless, of course, the incompetency appears only on examination.

CREDIBILITY OF WITNESSES.

As we have already seen, instead of altogether excluding a witness on account of some supposed bias, the course generally adopted is to admit his evidence, allowing the circumstances causing suspicion to affect his credibility. The great canon as to the credit of witnesses is that it is for the jury to form their opinion thereon, as on any other fact. "The credibility of a witness is compounded of his knowledge of the facts, his disinterestedness, his integrity, his veracity, and his being bound to speak the truth by such an oath as he deems obligatory. Proportioned to these, is the degree of credit his testimony deserves from the court and jury."(*n*).

(*l*) v. 3 and 4 Wm. 4, c. 49; 3 and 4 Wm. 4, c. 82; 1 and 2 Vict., c 77; 24 and 25 Vict., c. 66.

(*m*) v. Best, Ev. 230. (*n*) Arch. 296.

We have just noticed the means taken to secure the most stringent obligation by oath or affirmation.

As to *knowledge*.—It will be important to consider on what the witness bases his conclusion; what opportunities he had of satisfying himself; what were the surrounding circumstances, whether they were such as to conduce to a correct opinion; for example, whether it was light or dark, etc.

As to *disinterestedness*.—Here should be considered the relationship of the prisoner and witness, natural or otherwise; the advantage or disadvantage that would accrue to the witness on the prisoner's conviction; prejudices, quarrels, etc.(*o*)

As to *veracity*.—The chief mode in which the veracity of a witness is impeached, is by showing that at some former time he has said or written, or, what is more damaging, sworn, something not agreeing with or opposed to that which he now swears. As to the manner in which he may thus be confronted with his former allegations, it is provided, by 28 Vict., c. 18, that if, on cross-examination, a witness does not admit having made a former statement, proof may be given that he did make it; but before such proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such a statement.(*p*) If the statement has been in writing, he may be cross-examined as to it without the writing being shown to him; but if it is intended to contradict him by the writing, his attention must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of so contradicting him. But this does not prevent the judge from inspecting and making such use of the writings as he thinks proper.(*q*) The writing most frequently used to impeach the testimony of a witness is his deposition taken before the magistrate.

(*o*) As to the evidence of accomplices, v. p. 350.

(*p*) 28 Vict., c. 18, § 4. (*q*) Ibid. § 5.

As to *general character*.—It has been noticed above that a person is a competent witness although he has been convicted of a crime; but of course that fact will carry weight with the jury. To weaken the testimony of a witness, either one of two courses may be taken. The witness may be cross-examined as to his delinquencies, or (b) other witnesses may be called to prove his generally bad reputation. After considerable conflict between the authorities, it seems to be settled that a witness may be asked questions with regard to alleged crimes, or other improper conduct; but that he is not compelled to answer them if such answer would tend to expose him to a criminal charge, or to a penalty or forfeiture of any kind.(*r*) And the court will decide whether the witness has shown reasonable grounds for believing that the answer will tend to criminate him.(*s*) But all other questions must be answered, however strongly they may reflect on the witness' character. And a denial of improper conduct by the witness is conclusive, and can not be contradicted by calling other witnesses, unless, of course, the fact be relevant to the issue.(*t*) A witness may be questioned as to whether he has been convicted of a felony or misdemeanor, and, if he does not admit it, the cross-examining party may prove the conviction.(*u*) In order to show the general bad character of the witness, almost any question may be asked as to his past life. It is left to the discretion and good feeling of the bar not to exceed the limits required by the necessities of the case, by wantonly taking away a person's character.(*x*) When other witnesses are called to show the bad character of the witness [for veracity], the object is to show that the former, from their acquaintance with the latter, are of the opinion that he is not to be believed on oath. But they may not be examined as to any particular offenses which are alleged against the

(*r*) v. 2 Taylor's Evidence, pt. 3, c. 3.

(*s*) R. v. Boyes, 30 L. J. (Q. B.) 301.

(*t*) Yewin's Case, 2 Camp. 638. It has been doubted whether such discrediting questions must be answered, if they are not otherwise material to the issue.

(*u*) 28 Vict., c. 18, § 6. (*x*) v. Fitz. St. 296.

witness. On the other hand, witnesses may be called to testify to the general good character of the witness, if that is questioned.

NUMBER OF WITNESSES.

In all cases, both before the grand jury and at the trial, one witness for the prosecution is sufficient, with the following exceptions:

1. In *treason* or misprision of treason (except where the overt act alleged is the assassination of the queen, or any direct attempt against her life or person), two witnesses are required, unless the prisoner confesses. And both of the witnesses must testify to the same overt act of treason; or one of them to one overt act, and another to an overt act of the same species of treason.(*y*) But, of course, collateral facts may be proved by one witness.

2. In *perjury* there must be two witnesses. Both need not necessarily directly contradict what the accused has sworn; it will suffice if the second corroborates in any material circumstance, by circumstantial evidence or otherwise, what the first has said.(*z*) The reason usually assigned for this exception is that otherwise there would only be oath against oath; but more probably the expediency of protecting witnesses, and thus furthering the ends of justice, is the ground.(*a*) [The fact of perjury can be established by one positive witness and other corroborative evidence.(1) The falsity of the oath may be proved wholly by documentary evidence.(2) The corroborative evidence need not be equivalent to the testimony of another witness; it must be enough to satisfy the jury.(3)]

It will be convenient here to notice the evidence of *accomplices*. Naturally it is viewed with suspicion, inasmuch as, on the one hand, the accomplice may hope to gain favor

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(*y*) 7 and 8 Wm. 3, c. 3, §§ 2, 4. (*z*) v. cases, etc., Best, Ev. 755.

(*a*) Best, Ev. 752.

(1) Commonwealth *v.* Pollard, 12 Metc. (Mass.) 225; Galloway *v.* State, 20 Ind. 442; State *v.* Heed, 57 Mo. 252; State *v.* Wood, 17 Iowa, 19.

(2) United States *v.* Wood, 14 Peters, 430.

(3) Crusen *v.* State, 10 Ohio St. 258; State *v.* Heed, 57 Mo. 252.

and leniency by assisting the prosecution; on the other hand, he will often be anxious to shield his companions. In practice, though not in strict law, it is deemed essential that the evidence of the accomplice should be corroborated in some material part by other evidence, so that the jury may be led to presume that he has spoken the truth generally. This confirmatory evidence must be unimpeachable; so that the evidence of another accomplice or his wife will not suffice. And the confirmatory evidence should not be merely to the fact of the act having been committed, but should extend to the identification of the prisoner with the party concerned.(*b*)

How is the *attendance of witnesses* procured? In both felonies and misdemeanors the witnesses examined are usually bound over by recognizance by the committing magistrate to appear at the trial and give evidence. If they do not appear, the recognizances may be estreated and the penalty levied. All other witnesses may be compelled to attend by *subpena*. This may be issued either at the crown office in London, or by the clerk of assize, or clerk of the peace at sessions. A copy of the writ is served upon the witness personally, the original writ being shown to him.

If a written instrument, required as evidence, is in the possession of some person, he is served with a *subpena duces tecum*, ordering him to bring it with him to the trial. Unless he has some excuse, allowed to be valid by the court, he must produce it at the trial. Such lawful excuses are the following: that the instrument will tend to criminate the person producing it; that it is his title-deed.

In the event of the non-appearance of a witness in answer to a *subpena*, he incurs certain penalties. If the writ has been sued out of the crown office, the queen's bench, upon application, will grant an attachment for the contempt of court. In other cases, the proceedings must be by way of indictment.(*c*) But to render a witness subject to these penalties, he must have been served personally, and served a reasonable time before trial. If his expenses have not been

(*b*) R. *v.* Farler, 8 C & P. 106. (*c*) v. Arch. 309.

tendered, and he is so poor as not to be able to go to the trial, this will probably be allowed by the court as a sufficient excuse.

If the witness is in custody, the proceedings are different. If in criminal custody, a secretary of state, or any judge of the superior courts, may, on application by affidavit, issue a warrant or order under his hand for bringing up such person to be examined as a witness;(*d*) or his attendance may be secured by a writ of *habeas corpus ad testificandum*. If in civil custody, a writ of *hab. corp. ad test.* is obtained upon motion in court or application to a judge in chambers, founded upon an affidavit stating that he is a material witness. If the evidence of a person in court is required, he is bound to give it, although he has not been subpenaed.

A witness, whether subpenaed or bound over by recognizance, either to prosecute or give evidence, is privileged from arrest whilst attending the trial on every day of the assizes or sessions until the case is tried; also for a reasonable time before and after trial whilst coming to or returning from the place of trial.

As we have seen, preventing a witness from attending or giving evidence is a contempt of court; and intimidating a witness from giving evidence for the prosecution is a misdemeanor.(*e*)

(*d*) 16 and 17 Vict., c. 30, § 9. (*e*) v. p. 82.

CHAPTER XVI.

THE EXAMINATION OF WITNESSES.

THIS is a subject on which, though a wide latitude is allowed to counsel, some rules may be laid down as directly authorized, others as developed in and sanctioned by practice.

We have already noticed the general course of the examination of witnesses; (*p*) namely, that the witnesses for the prosecution are first examined in chief by the counsel for the prosecution, and then cross-examined by the counsel for the defense; and after the case for the prosecution has closed, then the witnesses for the defense are examined by the counsel for the defense, and cross-examined by the counsel for the prosecution; in each case the witness being re-examined by the party calling him, if it is thought desirable. It should also be remembered that the court may, at any time, put such questions as it thinks fit to the witness, even after he has left the witness-box; and that if, after the counsel has finished his examination or cross-examination, he thinks of some other question which ought to have been asked, that question can be put only through or by leave of the court. Through the court, also, are asked questions which occur to the jury.

All the witnesses, whose names are on the back of the indictment, should be called by the counsel for the prosecution; and although he does not ask them any question, or even call them, the defense may have them called, so that they may be subjected to cross-examination. But, in such a case, the counsel for the prosecution may re-examine.(*q*)

(*p*) v. p. 334.

(*q*) R. v. Edwards, 3 Cox, 82; R. v. Beeslen, 4 C. & P. 220.

When any collusion is suspected among the witnesses, or it is thought that any of them will be influenced by what they hear from counsel or other witnesses, those who have not yet been examined are ordered to leave the court until they are wanted, and after examination they are required to remain in court. The judge will do this, either at his own instance, or on the application of the opposite party. If the order be disobeyed, the witness may be punished as for his contempt; but, though the disobedience will be matter of remark for the jury, the judge has no right to reject his testimony.(*r*)

At the outset it will be well to ascertain the position of the counsel for the prosecution and for the defense respectively, their functions and conduct, their respective parts, and the spirit in which they should conduct them. It is needless to observe that it is not the object of the counsel for the prosecution to get a conviction at any price. It is his duty to see that the case against the prisoner is brought out in all its strength; but it is not his duty to conceal, or in any way diminish the importance of, its weak points. His function is not to inquire into the truth, but to put forward, with all possible candor and temperance, that part of it which is unfavorable to the prisoner.(*s*)

On the other hand, the counsel for the prisoner has before him, as his object, the acquittal of the prisoner. His duty is to act as an advocate, and not to any extent as a judge. He is to put himself in the place of the accused, and so is not under any obligations which the accused would not be under. Thus, he is not obliged to divulge facts with which he may be acquainted which are unfavorable to the prisoner.(*t*)

(*r*) R. *v.* Colley, Moo. & M. 329. (*s*) Fitz. St. 160.

(*t*) "The counsel for the crown may not use arguments to prove the guilt of the prisoner which he does not himself believe to be just, and he is bound to warn the jury of objections which may diminish the weight of his arguments. In short, as far as regards his own evidence, his speech should as much as possible resemble the summing up of the judge. The counsel for the prisoner may use arguments which he does not believe to be just. It is the business of the jury, after hearing the judge, to say whether or not they are just."—Fitz. St. 168.

The rules, as to the examination-in-chief and cross-examination, are *generally* the same, whether the witness be for the prosecution or the defense. They are based upon the supposition that the witness, called and presented by the party examining him, is favorable to his side, and therefore unfavorable to his opponent. If this should turn out not to be the case, the rules of cross-examination apply to the examination of one who thus proves hostile to the party producing him.

Examination-in-chief.—What questions may be put to a witness? In the first place, only such as are *relevant* to the matter in issue, and which, if answered in the way desired by the examiner, will tend to prove the offense or defense. Of course, if circumstantial evidence is resorted to, greater latitude will be allowed; inasmuch as it is not so easy to estimate the relevancy of the question.

The second great rule is, that *leading questions* may not be asked in the examination-in-chief. What is a leading question? One which in any way suggests to the witness the answer which the person asking requires. Thus, to ask a witness, "Had the prisoner a white hat on?" would be a leading question; but the question, "What sort of a hat had the prisoner on?" would not be. Unless, indeed, the point to be proved was whether he had or had not a hat on. It is often given as a test whether a question be leading or not, whether it might be answered by "Yes" or "No." But this test is by no means decisive; all questions which may be thus answered not being leading, and other questions than those which may be so answered being equally leading. Thus, the question, "Could the prisoner hear what he said?" is not leading; whereas "What did he do with the purse?" is leading, because it implies that the person to whom it relates dealt with the purse in some way or other.(*u*) Though the rule is, that leading questions may not be put in examination-in-chief, there are certain exceptions, some allowed as of right, others for convenience sake.

(*u*) Fitz. St. 280.

(a.) For the purpose of identifying persons or things which have already been described, the attention of the witness may be directly pointed to them.(*x*)

(b.) When a witness is called to contradict another, who has sworn to a certain fact, he may be asked in direct terms whether that fact ever took place.

(c.) When the witness is, in the opinion of the judge, hostile to the party calling him.

(d.) When the witness is unable to answer general questions from defective memory, or the complicated nature of the matter as to which he is interrogated.(*y*)

Leading questions are also not objected to—

(a.) When merely introductory, so as to save time.

(b.) When the particular matter is not disputed. Thus, where a witness having deposed to a fact has not been cross-examined on it, questions may be put which assume that fact.

A third general rule is, that the evidence of the witness must relate to what is immediately *within his knowledge and recollection*. But there is one exception to this rule. In matters of science, skill, travel, etc., the evidence of experts is allowed—that is, persons who have a special knowledge of the branch in question may be called to give their opinion as to the consequences, etc., of facts already proved. For example, if the wounds of a murdered person are described, a surgeon may be asked his opinion as to whether they caused the death; but, of course, it will be for the jury to determine how far they will adopt this opinion.(*z*) In accordance with the general rule, a witness is not allowed to read his evidence. But he is allowed to *refresh* his memory by referring to any writing made by himself, or examined by him, soon after the event to which it refers, provided that after he has thus refreshed his memory he can swear to the fact from his own recollection.

A fourth general rule is, that the *contents of a written document* can not be proved orally if the document is capable

(*x*) R. *v.* Watson, 2 Starkie, N. P. C. 128.

(*y*) Best, Ev. 804.

(*z*) R. *v.* Wright, R. & R. 456.

of being produced, but must be proved by the document itself. But if it be shown that it is lost, destroyed, or in possession of the prisoner who has had notice to produce it, other evidence may be given of its contents.(*a*)

Another matter to be noticed is the *hostility* of one's own witness. It is a rule that a counsel can not discredit his own witness; it is also, as we have seen, a rule that leading questions may not be put in examination-in-chief. But it is provided by statute(*b*) that although a party producing a witness is not allowed to impeach his credit by general evidence of bad character, he may, in case the witness, in the opinion of the judge, proves adverse (*i. e.*, hostile), contradict him by other evidence, or, by leave of the judge, prove that at other times he has made a statement inconsistent with his present testimony; but before such last-mentioned proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement. So, also, if, in the opinion of the judge, the witness is keeping back some of the truth, in order to favor the prisoner or otherwise, he may allow the examining counsel to ask leading questions, and generally *to treat the witness as hostile.*

Cross-examination.—Inasmuch as a witness is supposed to be inclined to favor the party calling him, greater powers are given to the cross-examining counsel. He may ask leading questions, and in this way remind the witness of any thing which may tend to help the cause of the opposite party. But if the witness proves any thing favorable to the cross-examiner, the fact that the evidence was procured by leading questions will, of course, diminish its value. The counsel will not, however, be allowed to put in the witness' mouth the very words he is to echo back again.(*c*) In cross-examination the questions will be of two classes: (a.) Those which tend directly to refute or explain what has been given in evidence in the examination-

(*a*) v. p. 412. (*b*) 28 Vict., c. 18, § 3.
(*c*) R. v. Hardy, 24 How St. Tr. 755.

in-chief; (b.) Those whose object is to affect the credit of the witness. It is not usual to cross-examine witnesses to character except the counsel cross-examining has some distinct charge on which to cross-examine them.(*d*) It is needless to add that a cross-examining counsel should avoid asking questions, the answer to which, if unfavorable, would be conclusive against him. And he should always remember that the story of the witness, if true, will be confirmed the more he is questioned about it; and this although there may be slight discrepancies on immaterial points.

[There is a diversity of practice as to the proper limit of cross-examination. In England, when one party introduces a witness, has him sworn, and asks him a single question, however unimportant, he thereby makes him a witness in the case, and the other party has the right to cross-examine him upon all matters pertinent to the case.(1) And if the prosecutor puts upon the stand a witness whose name is indorsed as a witness on the indictment, or if the prosecutor fails to call any such witness, the accused may have such witness called and sworn as a witness for the prosecution, and may cross-examine him upon the whole case.(2)

The rule that the cross-examination of a witness is not restricted to the subject-matter of the direct examination, but extends to the whole case, is followed in New York,(3) Alabama,(4) and Missouri,(5) and, subject to such restrictions as the court may impose, in Massachusetts.(6)

(*d*) R. *v.* Hodgkins, 7 C. & P. 298.

(1) Taylor on Ev., § 1289, and cases there cited.

(2) Rex *v.* Simmons, 1 C. & P. 84; Rex *v.* Beezlen, 4 C. & P. 220, Rex *v.* Bodle, 6 C. & P. 186, Reg. *v.* Vincent, 9 C. & P. 91; Reg. *v.* Bailey, 1 Cox C. C. 191.

(3) Eden *v.* Varick, 7 Cow. 238, affirmed 2 Wend. 166; Fulton Bank *v.* Stafford, 2 Wend. 483.

(4) Fralick *v.* Presley, 29 Ala. 457; Kelley *v.* Brooks, 25 Ala. 523.

(5) State *v.* Sayers, 58 Mo. 585; and see Squire *v.* Wright. 1 St. Louis Court of Appeals, 172.

(6) Webster *v.* Lee, 5 Mass. 334; Moody *v.* Russell, 17 Pick. 490; Commonwealth *v.* Lannan, 13 Allen, 563; Commonwealth *v.* Morgan, 107 Mass. 199; Commonwealth *v.* Lyden, 113 Mass. 452; Wallace *v.* Taunton St. R. R. Co., 119 Mass. 91.

In the Supreme Court of the United States, "the rule has been long settled that the cross-examination of a witness must be limited to matters stated in his direct examination." If the adverse party desires to examine him as to other matters, he must do so by calling the witness to the stand in the subsequent progress of the cause.(1)

The rule of the Supreme Court of the United States is followed in New Jersey,(2) Indiana,(3) Illinois,(4) and Iowa.(5) The same rule is followed in Pennsylvania;(6) but it is explained that "the matter stated in the direct examination" is not to be taken in a narrow sense. "The signature of a subscribing witness to an ordinary instrument of writing implies nothing more than that the instrument was signed by the person whose deed or act it purports to be. It is not so in the case of a subscribing witness to a will. His attestation is an assertion, not only that the will was signed by the testator, but of the further fact that the testator was of sound mind when he executed it." Hence, when, upon an issue of *devisavit vel non*, the propounder of the will introduced an attesting witness to testify simply to the execution of the will, the contestant had the right to cross-examine the witness as to the sanity of the testator.(7)

This rule has received a further explanation in Michigan. "It is the tendency of the direct examination which determines the subject of it, as a test for cross-examination; it is that essential or ultimate fact in the plaintiff's case which the direct examination tended to prove, which determines the logical limits of the cross-examination, and not merely the particular minor facts and circumstances tending to the proof of that fact. When two or more main facts are essen-

(1) Houghton *v.* Jones, 1 Wall. 702.

(2) Donelly *v.* State, 2 Dutcher (26 N. J. Law), 463, see p. 494.

(3) City of Aurora *v.* Cobb, 21 Ind. 492, see pp. 511, 512.

(4) Stafford *v.* Fargo, 35 Ill. 481; Bell *v.* Prewitt, 62 Ill. 361; Drohn *v* Brewer, 77 Ill. 280.

(5) Cooley *v.* State, 4 Iowa, 477; Wilhelmi *v.* Leonard, 13 Iowa, 330

(6) Ellmaker *v.* Buckley, 16 Serg. & R. 77; Helser *v.* McGrath, 53 Penn. St. 531.

(7) Egbert *v.* Egbert, 78 Penn. St. 326.

tial to plaintiff's *prima facie* case, such as the title of the plaintiff, and conversion by defendant in trover, and the direct examination has been confined to matters tending only to the proof of one of those main facts, the defendant should not be allowed to cross-examine as to the other."(1)

In Ohio, "the right of cross-examination is not to be limited by the particular facts disclosed in the examination-in-chief, but may be extended to whatever the party calling the witness is required to establish to make out and sustain his cause of action or his defense. Thus, a witness of the plaintiff may be cross-examined by the defendant touching all matters which it is competent for the plaintiff to prove under the issue, in order to entitle him to recover. And, on the other hand, the plaintiff may cross-examine the defendant's witnesses to all maters which the defendant may prove under the issue, in order to sustain his defense." "But a defendant has no right to go into the distinct matter of his defense, by way of avoidance, before the plaintiff has rested."(2)

The rule in Mississippi is the same as in Ohio.(3) In California, the same rule as in Ohio was once adopted. "If the defendant sets up a defense not necessarily involved in the denial of the plaintiff's case, but consisting of new matter, the defendant must wait until after his opening, before he offers proof of this new matter."(4) But in later cases the rule of the Supreme Court of the United States is followed.(5)]

Re-examination.—The object of the re-examination, if it be judged expedient to have recourse to it, is to inquire into and explain what has transpired on cross-examination. But it must be strictly confined to such matter; the re-examiner may not ask questions which he might and ought to have put on examination-in-chief.

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(1) Campau *v.* Dewey, 9 Mich. 381, see p. 419; and see O'Donnell *v.* Segar, 25 Mich. 367.

(2) Legg *v.* Drake, 1 Ohio St. 286, see p. 292.

(3) Mask et al. *v.* State, 32 Miss. 405, see p. 427.

(4) Jackson *v.* Feather River Water Co., 14 Cal. 18.

(5) Aitken *v.* Mendenhall et al., 25 Cal. 212; People *v.* Miller, 33 Cal. 99.

Any further questions after re-examination must be put through the judge; also through him any questions which occur to counsel after they have finished their examination or cross-examination.(*e*)

[For good cause shown, the judge may, in his discretion, permit the party who called the witness, after re-examination, to examine him in chief on new matter. In such case, the other party has the right to cross-examine on such new matter. In the same way it is in the discretion of the court to permit a witness to be recalled, in order that he may be examined, cross-examined, or re-examined by the party recalling him; or to permit the witness on his own motion to return to the stand to correct or explain his testimony. A witness may also be recalled at the request of the jury.(1)]

If any improper question (*e. g.*, irrelevant or leading) in examination-in-chief be put, the counsel on the other side should immediately interpose and object to it before the witness has time to answer it. Though in the case of a leading question this will often be ineffectual, inasmuch as the mischief has been done by the suggestion being made. The counsel in the same way should interpose if parol evidence is given when a document should be produced.

(*e*) v. p. 334.

(1) For authorities, see notes to §§ 572, 573, 574. Wharton on Evidence.

CHAPTER XVII.

EVIDENCE.

"EVIDENCE includes all the legal means, exclusive of mere argument, which tend to prove or disprove any matter of fact the truth of which is submitted to judicial investigation."(*f*)

In ascertaining the law on the subject of evidence in general, four or five heads present themselves under which may be ranged the chief principles which it is necessary to consider:

1. On whom the burden of proof lies.
2. What must be proved, and what may not be proved.
3. The best evidence must always be given.
4. Hearsay is not evidence.
5. Confessions, under certain circumstances, are not admitted as evidence.

1. The *burden of proof* is on the prosecution as a rule. The prosecution must prove their case before the prisoner is called upon for his defense; and this, although the offense alleged consists of an act of omission and not of commission, and therefore the prosecution have to resort to negative evidence.(*g*) The law considers a man innocent until

(*f*) 1 Tayl. Ev. 1.

(*g*) There is an exception to this rule when the accused pleads specially, *e. g.*, *autrefois acquit.* [The issue made by the pleadings determines on which party the burden of proof lies. Throughout the trial the burden of proof remains on him to establish his claim, while the other party is bound only to prevent the claim being established. When the issue is made by a special plea in bar, as former acquittal or former conviction, the burden is on the defendant. But when the issue is made by the plea of not guilty, the burden is continually on the state to prove the guilt of the defendant; and the defendant need only invalidate, or raise a reasonable doubt as to the proof of, any essential ingredient of the crime charged. But this is by no means uni

he is shown to be guilty. But the principle under discussion must not be understood with unlimited significa-

versally accepted. For when the law creates a particular disputable presumption, either in the absence of evidence, as the presumption of innocence or the presumption of sanity—or from the proof of some fact, as the presumption of larceny from the unexplained possession of stolen goods, or the presumption of malice from the fact of killing—a particular burden of proof is frequently said to lie on the party who proposes to controvert such presumption. Accordingly, many cases speak of the burden of proof shifting, in the course of the trial, from one party to the other. This is especially the case with the presumptions of sanity and of malice.

The state must prove, beyond a reasonable doubt, every essential element of the crime charged. Criminal intent, unless otherwise provided by statute, is an essential element. If the defendant was insane, the law holds he was incapable of criminal intent. Hence, the defense of insanity is merely a denial of criminal intent, and is, therefore, provable under the general issue. Hence, if the evidence raises a reasonable doubt of the sanity of the defendant, it raises a doubt as to his criminal intent, and, logically, he is entitled to an acquittal. And it is so held in State *v.* Bartlett, 43 N. H. 224; State *v.* Jones, 50 N. H. 369; State *v.* Johnson, 40 Conn. 136; People *v.* McCann, 16 N. Y. 58; Wagner *v.* People, 4 Abb. App. Decisions, 509; McFarland's case, 8 Abb. App. Decisions, 57; Dove *v.* State, 3 Heiskell, 348; People *v.* Garbutt, 17 Mich. 1; Polk *v.* State, 19 Ind. 170; Bradley *v.* State, 31 Ind. 492; Hopps *v.* People, 31 Ill. 385; Chase *v.* People, 40 Ill. 352; State *v.* Crawford, 11 Kansas, 32; Wright *v.* People, 4 Neb. 407. The cases People *v.* Garbutt, 17 Mich. 1, and State *v.* Crawford, 11 Kansas, 32, are especially full and thorough.

In other cases, it is held that the presumption of sanity throws the burden of proof on the defendant; that the defense of insanity is in the nature of a plea of confession and avoidance; and that the defendant must establish the fact of his insanity by a preponderance of proof. Commonwealth *v.* Eddy, 7 Gray, 583; Ortwein *v.* Commonwealth, 76 Penn. St. 414; Lynch *v.* Commonwealth, 77 Penn. St. 205; Myers *v.* Commonwealth, 83 Penn. St. 131; Boswell *v.* Commonwealth, 20 Grattan, 860; State *v.* Coleman, 27 La. Ann. 691; McKenzie *v.* State, 26 Ark. 334; Graham *v.* Commonwealth, 16 B. Mon. 589; Kriel *v.* Commonwealth, 5 Bush, 362; Loeffner *v.* State, 10 Ohio St. 598; Bergin *v.* State, 31 Ohio St. 111; State *v.* Felter, 32 Iowa, 49; State *v* Stickley, 41 Iowa, 232; State *v.* Klinger, 43 Mo. 127; State *v.* Smith, 53 Mo. 267. But, in this last case, though the court says it is necessary for the defendant to make out insanity by a preponderance of testimony, it also says it is irregular to tell the jury so, and cites approvingly the statement of Mr. Bishop, that the jury should acquit if they entertain a reasonable doubt of the defendant's sanity. Bonfanti *v.*

tion. Though the burden of proof of the charge is in general on the prosecution, yet on particular points it is on the prisoner. This is markedly the case in some offenses. Thus, by various acts of parliament it is declared penal to do certain things, or possess certain articles, without lawful

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State, 2 Minn. 123; People *v.* McDonnell, 47 Cal. 134; People *v.* Wilson, 49 Cal. 13. The facility of juries in finding the existence of insanity, in cases of homicide, has influence in some of these decisions. The court say, in Ortwein *v.* Commonwealth: "And if this reasoning were less conclusive, the safety of society would turn the scale. Merely doubtful insanity would fill the land with acquitted criminals." The influence of this consideration may be estimated by comparing the ruling of this court in cases of homicide with the ruling made in the case of a contested will—Egbert *v.* Egbert, 78 Penn. St. 326.

Some American cases hold that the defense of insanity can not prevail, unless established beyond a reasonable doubt. These cases are clearly erroneous.

In like manner, the claim of self-defense is merely a denial of the malice which the prosecution is bound to establish beyond a reasonable doubt. Accordingly, some cases hold that the defendant is entitled to an acquittal, if, upon the evidence, it is doubtful whether the homicide or assault was malicious or was in self-defense. State *v.* People, 53 N. Y. 164; State *v.* Porter, 34 Iowa, 131; State *v.* Wingo, 66 Mo. 181. And, in Massachusetts, in cases of assault. Commonwealth *v.* McKie, 1 Gray, 61. While others hold the defendant must make out a case of self-defense by a preponderance of proof. People *v.* Shroyer, 42 N. Y. 1; Silvus *v.* State, 22 Ohio St. 99; Weaver *v.* State, 24 Ohio St. 584. And, in Massachusetts, in cases of homicide, the presumption of malice, arising from the fact of killing, remains till overcome by preponderance of proof.

Where the possession of stolen goods by the defendant is established, he is not required to prove by preponderance of proof that he is innocent. State *v.* Merrick, 19 Maine, 401. In a case of forgery, where it was proved that the paper came into the hands of the defendant unaltered, and left his hands altered, it was held error to charge that thereby the burden was cast on the defendant to prove that he did not alter it. The court said: "If the result of the case depends upon the establishment of the proposition of the one on whom the burden was first cast, the burden remains with him throughout, though the weight of evidence may have shifted from one side to the other, according as each may have adduced fresh proof. There is a wide difference between a requirement, in a criminal prosecution, that the accused shall prove his innocence, when a presumption is raised against him, and the necessity of explaining, in some degree, the fact on which that presumption rests." State *v.* Flye, 26 Maine, 312]

excuse or authority; such excuse or authority must be proved by the accused. For example, to possess public stores marked with the broad arrow;(*h*) to possess coining tools.(*i*) Again, it lies on the defendant to prove that signals to smuggling vessels were not made for the purpose of giving illegal notice;(*k*) also to show some justification for sending an unseaworthy ship to sea.(*l*) But it will be noticed that in all these cases there is something to be proved in the first instance by the prosecution—either the possession of the goods, the unseaworthiness of the ship, etc.

And not only in the particular cases of which we have given examples, but in most cases of circumstantial evidence "there is a point (though it is impossible to determine exactly where it lies) at which the prosecutor has done all that he can reasonably be expected to do, and at which it is reasonable to ask for evidence from the prisoner in explanation, and to draw inferences unfavorable to him from its absence."(*m*) Thus the court will naturally expect from the prisoner an explanation of the object for which poison was purchased; so also in the case of recent possession of stolen goods. Killing is presumed to be murder until otherwise accounted for.

2. *What must be proved?*—All facts and circumstances stated in the indictment which can not be rejected as surplusage; in other words, all the constituents of the offense. Though, as we shall see hereafter, if a more serious crime contains, as it were, a less serious one, the prisoner indicted for the former may sometimes be convicted of the latter; if the more serious circumstances can not be established; thus on an indictment for murder, if the malice prepense be not proved, the prisoner may be convicted of manslaughter.

We have seen above(*n*) in what cases the time and place must be correctly stated in the indictment;(*o*) and thus we now know when they must be correctly proved. But in

(*h*) v. 38 and 39 Vict., c. 25.
(*i*) 24 and 25 Vict., c. 99, § 24.
(*k*) 16 and 17 Vict., c. 107, § 245.
(*l*) 38 and 39 Vict., c. 88, § 4.
(*m*) Fitz. St. 303.
(*n*) v. p. 264.
(*o*) v. p. 264.

any case the offense must be proved to have been committed within the extent of the court's jurisdiction. Any material variance between the fact laid in the indictment and the fact proved will be fatal, unless amended.(*p*)

[In criminal cases, as in civil, descriptive averments must be strictly proved. If, under a statute against stealing any horse, mare, or gelding, the indictment charges the stealing of a horse, and the evidence shows the theft of a gelding, the defendant must be acquitted.(1) But the contrary is held in England.(2) So if the charge is stealing two turkeys, and the evidence shows the stealing of two dead turkeys;(3) for the allegation of an animal means a live animal, unless it is described as dead.(4) A variance as to a person named in the indictment is fatal, unless it is a variance in spelling merely, which does not affect the sound. The cases are not entirely harmonious in determining what is a variance in sound. Where the name in the indictment was Dougal McInnis, and the name proved was Dougal McGinnis, the variance was fatal;(5) while proof of Winyard in place of Whyneard, as averred, was not.(6)

When a paper is set out by its tenor in the indictment, the rule is "that where the omission or addition of a letter does not change the word, so as to make it another word, the variance is not material."(7) Where the allegation was "not," and the proof was "nor," and the sense was not affected thereby, the variance was fatal;(8) but where the allegation was "undertood," and the proof was "understood," the variance was not fatal.(7)

Though the descriptive averment be unnecessary, still it must be strictly proved. Where, in an indictment for the theft of a horse, the failure to prove that the stolen horse

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(*p*) v. p. 265, 267.

(1) Hooker *v.* State, 4 Ohio, 350; Turley *v.* State, 3 Humph. 323.

(2) Reg. *v.* Aldridge, 4 Cox C. C. 143.

(3) Rex *v.* Halloway, 1 C. & P. 128.

(4) Rex *v.* Edwards, R. & R. 497; Commonwealth *v.* Beaman, 8 Gray, 497; State *v.* Jenkins, 6 Jones (N. C.), 19.

(5) Barnes *v.* People, 18 Ill. 52. (6) Rex *v.* Foster, R. & R. 412.

(7) Reg. *v.* Drake, 11 Modern, 78. (8) Rex *v.* Beech, Comp. 229.

was black was fatal.(1) And where, in an indictment for bigamy, the woman was needlessly described as a widow, the failure to prove her widowhood was fatal.(2)

The rule that a descriptive averment must be strictly proved has one qualification in cases of homicide and felonious assault. If the averment is that the homicide was caused or the assault made in a designated manner, it is not necessary to prove strictly the details of the means averred to have been used in so committing the offense. If the indictment is for murder by poisoning, and it is averred by poisoning with a certain drug, the indictment is supported by proof of poisoning with a different drug.(3) A charge of felonious assault with a staff will be sustained by proof of such assault with another bruising implement, as a stone;(4) and a charge of strangling by clasping both hands about the throat is sustained by proof of strangling by placing one hand over the mouth.(5)

A mistake in the name of the defendant does not occasion a variance, since it is not necessary to prove his name. If the defendant desires to take advantage of such mistake, he does so by plea in abatement. If this plea is sustained, the indictment is amended, and the case proceeds.

The effect of variance in particulars not material to the merits of the case is overcome in Michigan by a statute authorizing the indictment to be amended to correspond with the evidence, when such a variance occurs;(6) and in Ohio by the statutes declaring that no such variance shall be ground for acquittal.(7) Under the Ohio statute, it was held that the defendant was correctly convicted where the indictment charged him with stealing certain articles of silverware, and the evidence showed the articles were of plated ware, consisting of only one-twenty-fifth part silver.(8)]

(1) 1 Stark. Ev. 374. (2) Rex v. Deeley, 4 C. & P. 579.
(3) East, P. C., c. 5, § 107.
(4) Sherwin's Case, cited East, P. C., c. 5, § 107.
(5) Rex v. Culkins, 5 C. & P 121. (6) Rev. Stat. (1871), p. 2172.
(7) 74 Ohio L. 334.
(8) Goodall v. State, 22 Ohio St. 203.

Closely connected with the question "what must be proved?" is the question "what may not be given in evidence?" As a rule, nothing must be given in evidence which does not directly tend to prove or disprove the matter in issue. The previous or subsequent bad character of the prisoner may not be proved; unless to rebut evidence of good character.(*q*) Thus, also, if other true bills are found against the prisoner, theoretically this is not supposed to influence the judge or jury.(*r*) Nor may it be proved that he has a general disposition to commit the particular kind of offense. Again, it is not allowable to prove a man guilty of one felony in order to prove him guilty of another unconnected with it. In other words, if the offenses are distinct, evidence of one offense is, in general, inadmissible on the trial of the prisoner for another offense. But if they are connected, and form one entire transaction, other offenses may be proved to show the character of the transaction. If the evidence is admissible on general grounds as being relevant, it can not be excluded merely because it discloses other offenses.(*s*)

There are exceptions to the rule excluding evidence of other offenses:

(a.) In *treason*, other overt acts may be given in evidence, if they directly prove any overt acts which are laid. And in conspiracy, sedition, libel, and similar offenses, wide limits are given to the reception of evidence, inasmuch as the offense can only be estimated by the surrounding circumstances.(*t*)

(b.) When it is necessary to prove the *guilty knowledge* of the defendant, evidence may be given of his having committed the same offense before. Thus, on an indictment for uttering forged bank-notes, or for uttering counterfeit

(*q*) v. R. *v.* Rowton, 34 L. J. (M. C.) 57.

(*r*) However, as both the judge and jury are supplied with calendars, they can not help noticing that there are other charges against the prisoner. It would be well if the jury, at least, were not so supplied; they know perfectly well without a calendar what they are to give their verdict on.

(*s*) Rosc. 90; v. R. *v.* Salisbury, 5 C. & P. 155.

(*t*) v. R. *v.* Hunt, 3 B. & Ald. 566; R. *v.* Pearce, Peake, 75.

coin, evidence may be given of the defendant's having at other times uttered or had in his possession other forged bank-notes or counterfeit coin. So it seems that the guilty knowledge of the falsehood of a pretense may be shown by evidence of a previous obtaining or attempting to obtain by false pretenses.(*u*) Under the prevention of crimes act, 1871,(*x*) when proceedings are taken against a person for *receiving* or having in his possession stolen goods, evidence may be given at any stage of the proceedings of the defendant's having had in his possession, within the preceding twelve months, other stolen property; and evidence may also be given, under the same circumstances, of his previous conviction, within five years, of any offense involving fraud or dishonesty.

(c.) When it is necessary to prove *malice* or *intent* on the part of the defendant, evidence of other offenses may, under some circumstances, be given. Thus, in a trial for murder, evidence of former unsuccessful attempts or threats to murder would be admissible.

As to evidence of *good character*.—Witnesses may be called to speak generally to the good character of the prisoner; but they may not give evidence of particular acts, unless such evidence tends directly to the disproving of some of the facts put in issue by the pleadings. The evidence must be to the general reputation for good character, and not to the witness' own opinion. The way in which the information is elicited is by questions of this sort: "How long have you known the prisoner?" "During that time, what has been his general character for sobriety, honesty, and industry?"

General evidence of good character may be disproved by general evidence of bad character, but not by particular cases of misconduct. However, for such purposes, previous convictions may, as a rule, be proved.(*y*)

(*u*) R. v. Francis, L. R., 2 C. C. R. 128; 43 L. J. (M. C.) 97.

(*x*) 34 and 35 Vict., c. 112, § 19.

(*y*) v. 6 and 7 Wm. 4, c. 111; 24 and 25 Vict., c. 96, § 116; 24 and 25 Vict., c. 99, § 37.

It is important to notice in what way evidence of previous good character operates. "Judges frequently tell juries that evidence of character can not be of use, when the case is clearly proved, except in mitigation (or, possibly, aggravation) of punishment; but that, if they have any doubt, evidence of character is highly important."(z)

3. The *best evidence* must always be given—that is, if it is possible to be had. If not, then inferior evidence will be admitted. But, before this inferior (or *secondary*) evidence is let in, the absence of the better evidence must be accounted for. By this is meant that merely substitutionary evidence—that is, such as indicates more original sources of information—must not be received, so long as the original evidence is attainable. It does not imply that weaker proofs (which are not substitutionary) may not be selected instead of stronger ones. Thus, an act may be equally proved by a written instrument, and also by one who saw it; both these modes of proof are primary.

The most common application of this rule is in the case of written instruments. It is plain that the best evidence of the contents of a written document is the writing itself; and, therefore, before a copy or parol evidence of its contents can be received, the absence of the original instrument must be accounted for, by proving that it is lost or destroyed, or that it is in the possession of the opposite party, and that he has had reasonable notice to produce it. If once secondary evidence is admitted, any proof may be given, as there are no degrees of secondary evidence; thus, if an original deed can not be produced, parol evi-

(z)Fitz. St. 312. "This always seems to me to be equivalent to saying, 'If you think the prisoner guilty, say so; and if you think you ought to acquit him independently of the evidence of character, acquit him rather more readily because of it.' Evidence of character would thus be superfluous in every case. The true distinction is, that evidence of character may explain conduct, but can not alter facts. I do not disbelieve a credible witness because the man whose hand he swears he saw in his neighbor's pocket has a very high character for honesty; but I do not draw the inference from the fact which I should draw in most cases, namely, that there existed a felonious intent. I ascribe the act to some innocent motive."—Ibid.

dence of its contents may be given, although there is an attested copy in existence. But, for the sake of convenience, copies may be given in evidence of all records other than those of the court requiring proof of them, of journals of either house of parliament, and, generally, of the official documents of other courts, and parish registers, entries in corporation books, and books of public companies relating to things public and general.

Entries in bankers' books may be proved by examined copies verified on oath or by affidavit.(*z*).

4. *Hearsay is no evidence.*

Hearsay (*derivative*, or *second hand*, as opposed to *secondary*) evidence is that which is learnt from some one else, whether by word of mouth or otherwise; in other words, it is any thing which does not derive its value solely from the credit given to the witness himself, but which rests also, in part, on the veracity and competence of some other person.(*a*)

The reasons usually assigned for the rejection of hearsay evidence are two: (a) that the original statement or writing was not made on oath; (b) that the party affected has not the opportunity of cross-examining the originator of it. Its reception would also have the effect of lengthening the proceedings, without any corresponding advantage. We have seen that secondary evidence can be given only where there has been an explanation of the absence of the best evidence; second-hand evidence can not be given at all, subject to the following exceptions:(*b*)

i. To prove the death of a person beyond the sea.

ii. To prove a prescription, a custom; matters of pedigree; reputation on questions of public or general right.

iii. When the hearsay is what the witness has been heard to say at another time, in order to invalidate or confirm his testimony given in court. [This is not hearsay. The evidence is direct and primary that the witness made a certain statement; there is no evidence, in such case, either

(*z*) Bankers' Books Evidence Act, 1879 (42 Vict., c. 11).

(*a*) 1 Ph. Ev. 185.

(*b*) "All the exceptions to the rule are based upon the principle that the special circumstances which establish them supply a sanction to to the statement, and exclude the possibility of calling the person who made it."—Fits. St. 319.

direct or hearsay, as to the truth of the matter contained in the statement.]

iv. Declarations made by persons under the sensible conviction of their impending death. Such declarations are admitted only when the death of the deceased is the subject of the charge (that is, in cases of murder or manslaughter), and only if the declaration refers to the injury which is the cause of death.

v. Statements made by deceased persons, if against their interest; or entries made by them in the regular course of their duty or employment.

vi. When the bodily or mental feelings of a person are material to be proved, the usual expressions of such feelings, made at the time in question, are admissible as original evidence:(*c*) for example, what was said to a surgeon immediately after an assault.(*d*)

vii. When the sayings, etc., of another are part of the *res gestæ*, that is, of the general transaction, and are not merely a medium of proof of another fact. Thus the cries of a person being stabbed, of a mob, are good evidence.(*e*) In fact, these are not strictly instances of hearsay evidence at all, but the original proofs of what took place.

[viii. Evidence, in a second trial, of testimony given by a witness now deceased, at a former trial of the same case between the same parties.(1)]

(*c*) 1 Tayl. Ev. 530. (*d*) Aveson *v.* Lord Kinnaird, 6 East, 198.

(*e*) v. 21 How. St. Tr. 514, 529.

(1) "It is essential to the competency of *the witness* called to give this kind of evidence, first, that he heard the deceased person testify at the former trial; and second, that he has such accurate recollection of the matter stated, that he will, on his oath, assume or undertake to narrate in substance the matter sworn to by the deceased person, in all its material parts, or that part thereof which he may be called on to prove.

"It is essential to the competency of *the evidence*, first, that the matter stated at the former trial by the witness, since deceased, should have been given on oath; second, between the same parties, and touching the same subject-matter, where opportunity for cross-examination was given the person against whom it is now offered; and third, that the matter sworn to by the deceased be stated, in all its material

It will be convenient here to notice the rule that if a witness is dead, or too ill to travel (or kept out of the way, as against the person so keeping him out),(*f*) his depositions may be read, provided that such depositions were taken in the presence of the accused, and that he had an opportunity of cross-examining the witness.(*g*)

5. *Confessions*, under certain circumstances, are not admitted as evidence.

Confessions, if received at all in evidence, are received with great caution, not only from the consideration that, owing to insanity, or other reason, they may be false, but also there is the danger of their not having been correctly reported. The general rule is, that to be admissible they must be free and voluntary. What amounts to a free and voluntary confession does not clearly appear. "This much is certain, that no confession by the prisoner is admissible which is made in consequence of any inducement of a temporal nature, having reference to the charge against the prisoner, held out by a person in authority; and on the whole, the tendency of the present decisions seems to be to admit any confessions which do not come within this proposition.(*h*)

Confessionary evidence is admissible only against the person who makes it, though, of course, if the jury hear any thing in it against accomplices, it will be apt to prejudice them against such co-defendants. In the same way, if a confession is improperly blurted out where it is not admissible, it can not but have weight with the jury.

With regard to confessions or statements before the magistrate, it is provided by statute(*i*) that after the examina-

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parts, and in the order in which it was given, so far as necessary to a correct understanding of it.

"The requirement that all the matter sworn to at the former trial by the person, since deceased, be stated, being one of the tests of the evidence, not of the witness, it is not essential that it be all proven by a single witness." Summons *v.* State, 5 Ohio St. 325.

(*f*) R. *v.* Scaife, 2 Den. 281.

(*g*) 11 and 12 Vict., c. 42, § 16. So, also, as to depositions on behalf of the accused, 30 and 31 Vict., c. 35, § 3.

(*h*) Rosc. 40.

(*i*) 11 and 12 Vict., c. 42, § 18.

tion of all the witnesses for the prosecution, one of the magistrates shall have all the depositions against the accused read to him, and shall then say to him these words, or words to the like effect: "Having heard the evidence, do you wish to say any thing in answer to the charge? You are not obliged to say any thing unless you desire to do so, but whatever you say will be taken down in writing, and may be given in evidence against you upon your trial." The magistrate gives a further caution that the accused has nothing to hope from any promise of favor, and nothing to fear from any threat which may have been holden out to induce him to make any confession or admission of his guilt. But this second caution is necessary only when it appears that some inducement has been holden out to the accused.(*k*) The statement of the prisoner thus made before the magistrate is read at the trial from the depositions without further proof.

It will be remembered that a witness is not compelled to answer questions which tend to criminate himself. By several statutes, though they are obliged to answer the questions, the evidence given by witnesses is expressly declared not available against them on a criminal charge; for example, under the corrupt practices prevention act, 1863.(*l*)

CIRCUMSTANTIAL AND PRESUMPTIVE EVIDENCE.

It is usual to distinguish two kinds of evidence, *direct* or *positive*, *circumstantial* or *presumptive*. By the former we mean the evidence given by a person who testifies to having actually seen, etc., the act constituting the crime committed; the proof applying immediately to the *factum probandum*, without any intervening process. All other evidence is termed indirect, presumptive, or circumstantial; being evidence of facts from which the fact of the crime may be inferred; it applies to collateral facts which contribute to the conclusion that the principal fact exists.

(*k*) R. *v.* Sansome, 19 L. J. (M. C.) 143.

(*l*) 26 Vict., c. 29, § 7. For other examples, *v.* Tayl. Ev. 1261.

Thus, if a witness proves that he saw the prisoner cut A.'s throat, or put his hand into B.'s pocket, draw out his purse, and run away, the evidence is direct. But if the witness proves that the prisoner was seen going to B.'s house at 4 o'clock; that there was no other person in the house at the time; that at 4:15 B.'s throat was found cut, and that a blood-stained knife was found concealed in B.'s locked box, the evidence is circumstantial.

It is difficult to draw the line between direct and circumstantial evidence. This will be seen more readily from an example. A. stabs B. in three places; it is not known in consequence of which of the wounds death ensues. C. sees A.'s hand raised to strike one of these blows. Is his evidence to be regarded as direct or circumstantial as to the murder? In other words, it is often impossible to draw the line between the principal fact and subsidiary facts.(*m*) And if it were possible clearly to distinguish, what would be the advantage? It is certainly incorrect to say that direct is stronger than circumstantial evidence. It may be that in the former there is not the danger involved in drawing the inferences which are incidental to the latter; but, on the other hand, in the latter more facts are brought on the carpet by a greater number of witnesses, and thereby any mistake is much more likely to be exposed.(*n*)

(*m*) "It is impossible to say specifically of any crime which is the principal fact. In murder, is the principal fact the conception of malice in the mind, or the infliction of bodily injury, or the death in consequence? Unless all these take place there is no murder. These facts may occur at times and places remote from each other. Are there three principal facts?"—Fitz. St. 267.

(*n*) "There is no sort of difference between the cogency of the different kinds of evidence, whether the comparison is made between weak cases or strong ones. Compare two strong cases. How is it possible to say whether the evidence of several credible witnesses, who say they saw a man put his hand into another man's pocket, and take out his purse and run away, is stronger or weaker than that of the same number of equally respectable witnesses who prove that the purse was taken, and that immediately afterward the prisoner was seen running away, and on being stopped was found to have the purse in a secret pocket, no explanation being given? Or take two weak cases. A man swears that he was robbed on a dark night, and that

The so-called circumstantial evidence is said to be of two kinds:

Conclusive, when the connection between the principal and evidentiary facts is a necessary consequence of the laws of nature; as in an *alibi*.

Presumptive, when it only rests on a greater or less degree of probability.(o) Such evidence is termed "presumptive," inasmuch as the fact of the crime is to be presumed from certain other facts.

Presumptions, or inferences of other facts from facts which are already admitted or proved, are sometimes divided into violent, probable, slight, or rash, according as the facts presumed necessarily, usually, or otherwise attend the fact proved. A more scientific classification is into presumptions:

i. *Juris et de jure.*
ii. *Juris.*
iii. *Facti* or *nominis.*

The last of these is the kind of presumption produced by evidence in the way we have noticed. The other two must be explained:

i. *Juris et de jure.*—Presumptions of this character are absolute, conclusive, and irrebutable. No evidence is allowed to be given to the contrary. For example, an infant under the age of seven is incapable of committing a felony. Every person knows the law.

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the prisoner is the man who robbed him. The light by which he saw him was the reflection of a furnace a long way off, which would cast a light at once strong and unsteady, and the robber was exposed to it only for a moment. A sack is stolen, and is found three months afterward, apparently concealed, in the house of a marine store dealer. He says something on the subject, which may be, and probably is, a lie. Other people had access to the place when the sack was found. Which of these cases is the stronger of the two? Their relative strength can not be shown to depend in any way on the properties of either direct or circumstantial evidence as such." . . . Circumstantial "is, in short, a word useful only for the sake of puzzling juries, and providing them with a loophole for avoiding a painful, but most important, duty."—Fitz. St. 273.

(o) Best, Ev. 25, 400.

ii. *Juris.*—Presumptions which are conditional, inclusive, and rebutable. They only hold good until the contrary is proved. For example, a child between the age of seven and fourteen is presumed to be incapable of committing a felony; but only till it is proved he had a mischievous discretion. A person is presumed to be innocent till he is shown to be guilty. Malice is presumed from the act of killing, unless its absence be shown.(1)

WRITTEN EVIDENCE.

Written documents may be divided into three classes; differing as to the manner in which they must be given in evidence and proved:

i. Records.
ii. Matters *quasi* of record.
iii. Written documents of a private nature.

i. *Records.*—First, as to acts of parliament. Public statutes do not need any proof; the court is bound judicially to take notice of them. And all acts passed since February 4, 1851, are to be taken as public acts unless the contrary be expressly provided.(*p*) Private acts must be proved by an examined copy of the parliament roll; or by a copy purporting to be printed by the queen's printers. As regards proof, general customs of the realm are on the footing of public acts; particular customs on that of private acts.

As to other records.—Inasmuch as the records of the various courts are frequently required to be given in evidence, perhaps in two places at the same time, and thus inconvenience would arise, as well as the danger of destruction or loss; and inasmuch as the whole community is interested in their preservation, alteration is not to be feared, the production of the originals is not to be required.(*q*) Their place is supplied by an exemplification of the record under the great seal, or under the seal of the court, or by a copy sworn to be true by a person who has compared it

(*p*) 13 and 14 Vict., c. 21, §§ 7, 8. (*q*) v. Best, Ev. 616.

(1) For a discussion of the law of presumptions, see 2 Wharton on Evidence, c. 14.

with the original. But a mere copy will not suffice if the matter of the record forms the gist of the pleading, *e. g.*, on a plea of *autrefois acquit*. A copy of a copy will never suffice. In certain cases not even a copy of the whole record is required. Thus, to prove a previous conviction or acquittal, it is sufficient that it be certified, or purport to be certified, under the hand of the clerk of the court, or other officer having the custody of the records of the court where such conviction or acquittal took place, or by the deputy of such clerk or officer, that the paper produced is a copy of the record of the indictment, trial, conviction, and judgment, or acquittal, as the case may be, omitting the formal parts thereof.(*r*) And, further, it has been provided that a previous conviction may be proved in any legal proceeding by producing a record or extract of such conviction, and by giving proof of the identity of the person against whom the conviction is sought to be proved with the person appearing in the record or extract of conviction to have been convicted. A record or extract in the case of an indictable offense is explained to be a certificate of the indictment and conviction of the nature of that described in 14 and 15 Vict., c. 99, § 13; and in case of a summary conviction consists of a copy of the conviction, purporting to be signed by any justice of the peace having jurisdiction over the offense in respect of which such conviction was made, or to be signed by the proper officer of the court by which such conviction was made, or by the clerk or other officer of any court to which such conviction has been returned. And there is no need to prove the signature or official character of the person whose signature appears.(*s*)

[Under the article in the constitution of the United States authorizing congress to prescribe the manner of authenticating the public acts, records and judicial proceedings of one state when they are offered in evidence in another state, congress has enacted: "The acts of the legis-

(*r*) 14 and 15 Vict., c. 99, § 13. See also 7 and 8 Geo. 4, c. 28, § 11; 24 and 25 Vict., c. 96, § 116; c. 97, § 70; c. 99, § 37.

(*s*) 34 and 35 Vict., c. 112, § 18.

lature of any state or territory, or any country subject to the jurisdiction of the United States, shall be authenticated by having the seals of such state, territory, or country affixed thereto. The records and judicial proceedings of the courts of any state or territory, or of any such country, shall be proved or admitted in any other court within the United States by the attestation of the clerk and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, that the said attestation is in due form."(1) This is not exclusive, and each state may prescribe for its own courts other modes of authentication which may also be sufficient. The states have generally provided that the printed volumes of the statutes of other states, made by authority, shall be received as evidence of the statute law, and the printed volumes of reported decisions shall be received as evidence of the law.]

ii. *Matters* quasi *of record.*—Without going into detail, it may be said generally that the proceedings, not being records, of any of the divisions of the high court, or of the ecclesiastical courts, may be proved by copies. In county courts the proceedings are to be proved by an entry in the clerk's book, or a copy bearing the seal of the court, and purporting to be signed and certified as a true copy by the clerk of the court.(*t*) In other inferior courts the proof is by producing the books in which the entry has been made, or by an examined copy. In bankruptcy, a copy of the *Gazette*, containing an adjudication of bankruptcy, is conclusive evidence of the bankruptcy.(*u*)

We have already noticed the provision which is made for the reading of the depositions for or against the prisoner in the case of a witness who is dead or too ill to travel.(*x*) To perpetuate the testimony which can be given by a person whose death is apprehended, it is provided that if it appear to some justice of the peace, and in the opinion of

(*t*) 9 and 10 Vict., c. 95, § 111.

(*u*) 32 and 33 Vict., c. 71, § 10. See also Arch. 263-265.

(*x*) v. p. 373.

(1) Rev. Stat. p. 170.

a registered medical practitioner, that some person is not likely to recover, and is able to give material information relating to an indictable offense, and it be not practicable to take the depositions in the ordinary way, the justice may take, in writing, the statement, on oath or affirmation, of the person who is ill, opportunity being given to the other party (prosecution or accused) to cross-examine the deponent. Having observed the formalities prescribed by the statute, such depositions are transmitted to the proper quarter. And if, on the trial of the offender, it is proved that the deponent is dead, or will not, in all probability, ever be able to travel or give evidence, the statement may be read in evidence.(*y*)

iii. *Written documents of a private nature.*—As to *deeds.*—As a general rule, if they are to be given in evidence, they must be produced themselves at the trial. But in cases of accidental loss, and others arising from necessity, the contents may be proved by copies or other secondary evidence. And so, also, if other written documents are lost, secondary evidence may be received, if the genuineness of the original instrument is proved at the same time.(*z*)

The manner of the proof of the execution of deeds and other written instruments is the same. If the instrument is one to the validity of which attestation is requisite, it must be proved by a subscribing witness. But to this rule there are several exceptions, for example, if the witnesses be dead, insane, etc.(*a*) But if the instrument is not one which requires attestation, even though it be actually attested, it need not be proved by the attesting witness,(*b*) but may be proved by simple proof of the party's handwriting.

Handwriting may be proved in several ways:

(a.) By one who has seen the party write (*ex visu scriptionis*).

(b.) By one who has carried on a correspondence, or had

(*y*) 30 and 31 Vict., c. 35, § 6.
(*z*) v. p. 370.
(*a*) v. Arch. 283.
(*b*) 28 Vict., c. 18, § 7.

other opportunities of getting acquainted with his writing (*ex scriptis olim visis*).

(c.) By comparison with documents known and admitted to be in the handwriting of the party (*ex scripto nunc viso*, or *ex comparatione scriptorum*). It is provided, by statute, that the comparison of a disputed writing with any writing proved, to the satisfaction of the judge, to be genuine, shall be permitted to be made by witnesses, and such writings, and the evidence of witnesses respecting the same, may be submitted to the court and jury as evidence of the genuineness or otherwise of the writing in dispute.(*c*)

It may be useful to notice the chief points in which differences exist between the rules of evidence in civil and criminal cases:(*d*)

1. In the latter, in some cases, more than one witness is required.(*e*)

2. Confessions—when admitted—when conclusive.(*f*)

3. A party to a cause may be a witness, but [in England] a prisoner on his trial may not.

4. The husband or wife of a party in a civil action may give evidence for or against his consort; but, as a rule, such evidence is excluded in criminal cases.(*g*)

5. The use of the depositions of witnesses prevented from attending in person;(*h*) and their use to contradict the witness at the trial itself.(*i*)

6. In cases of homicide, the dying declaration of the deceased is admitted in evidence as to the cause of death.(*k*)

7. Witnesses to character are allowed in criminal cases.

(*c*) 28 Vict., c. 18, § 8.
(*d*) v. 4 St. Bl. 426.
(*e*) v. p. 350.
(*f*) v. p. 372.
(*g*) v. p. 344.
(*h*) v. p. 373.
(*i*) v. p. 348.
(*k*) v. p. 372.

CHAPTER XVIII.

VERDICT.

We have already considered the province of the jury, and the opportunities afforded to them for considering their verdict. In order to clear up any difficulties, they may ask the opinion of the judge on any point which is not exclusively for their determination; or may have read over to them by the judge any part of the evidence; or, through the judge, in court, may ask any additional question of any witness. If they can not, after a reasonable time, agree upon their verdict, they are discharged,(*l*) the prisoner, of course, being liable to be tried again. Before finding the prisoner guilty, they must be unanimous in believing that there is no reasonable doubt of his guilt—not necessarily that there is no other possible explanation. If they do all agree, on coming into court again, if they have retired, they answer to their names. The clerk of the assize, clerk of the peace, or other officer, thus addresses them: "Gentlemen, have you agreed upon your verdict?" "How say you, do you find John Styles guilty or not guilty?" They deliver their verdict through the foreman. In treason or felony, the prisoner must be present when this is done, but not necessarily in misdemeanor.

Verdicts in criminal cases may be distinguished into—

General—*i. e.*, "guilty" or "not guilty" on the whole charge.

Partial—as when the jury convict on one or more counts of the indictment, and acquit on the rest.

Special—when the facts of the case, as found by the jury, are set forth, but the court is desired to draw the legal inference from the facts, for example, whether they amount to murder or manslaughter.

The jury may acquit one of several codefendants who are

(*l*) v. p. 327, as to discharge on account of death, etc., of juror.

joined in the same indictment, and convict the others, and *vice versa;* even though charged with jointly receiving.(*m*) But in cases where, to constitute the crime, it is necessary that a certain number should join in it, if so many are acquitted that less than the requisite number are left, these also must be acquitted—thus, three are necessary for a riot, two for a conspiracy.

A person charged with a felony or misdemeanor may be found guilty of an *attempt* to commit the same offense,(*n*) the same consequences following as if he had been in the first instance charged with the attempt only. [This applies, in states where there are only statutory crimes, only to such attempts as are specifically made criminal by statute.]

Upon an indictment for a misdemeanor, if the facts given in evidence amount to a felony, the prisoner is not on that account to be acquitted of the misdemeanor, unless the court thinks fit to discharge the jury and to order the defendant to be indicted for the felony.(*o*)

[The verdict must correspond with both the indictment and the evidence. A verdict finding the defendant guilty in a higher degree than charged, is erroneous.(1) The verdict can not find the defendant guilty of a distinct offense from the one charged; and finding him guilty with a different intent from that charged, is finding him guilty of a different offense.(2) If the charge is proved, the verdict may be guilty as charged, though the evidence also proves a different or a greater offense.(3) Where value constitutes an essential element of the crime, a general verdict of guilty is a finding of the amount charged.(4) But where statute requires the verdict to state the value of the thing stolen, embezzled, or obtained by false pretenses, an omission

(*m*) 24 and 25 Vict., c. 96, § 94.

(*n*) 14 and 15 Vict., c. 100, § 9. (*o*) Ibid., § 12.

(1) Commonwealth *v.* Smith, 2 Va. Cases, 327.

(2) Morman *v.* State, 24 Miss. 54.

(3) Commonwealth *v.* McPike, 3 Cush. 181; White *v.* People, 32 N. Y. 465.

(4) State *v.* White, 25 Wis. 369; Schoonover *v.* State, 17 Ohio St. 294; Clifton *v.* State, 5 Blackf. 224.

to state the value invalidates the verdict.(1) A general verdict of guilty convicts the defendant of all matters well charged in the indictment, and hence convicts him of the highest degree well charged.(2) Where the statute provides that counts for larceny, embezzlement, and obtaining goods by false pretenses may be joined in one indictment, and the defendant found guilty of either, a general verdict of guilty, under an indictment so drawn, is not valid. Where there is a verdict of guilty as to some counts in the indictment, and the jury fail to make a finding as to the other counts, the court may direct a verdict of acquittal to be entered as to the counts for which there is no verdict, or the prosecuting attorney may enter a *nolle prosequi* as to them. But it has lately been held, in Illinois, that finding guilty as to one count, and omitting to mention the other counts, is equivalent, of itself, to an acquittal of the others.(3) The earlier cases held such a verdict, failing to respond to all the issues, was irregular, and could not stand.(4) When the verdict is delivered, the jury may be polled at the request of either party. After the jury have returned their verdict, have been discharged, and have separated, they can not be recalled to alter or amend it.(5) In Kentucky(6) and Indiana,(7) when the jury find a verdict of guilty, they also, as part of their verdict, fix the punishment. In Illinois,(8) the jury do so in felonies.]

Upon an indictment for *robbery*, the prisoner may be found guilty of an *assault with intent* to rob.(*p*)

Upon an indictment for *larceny*, the prisoner may be found guilty of *embezzlement*, and *vice versa*.(*q*)

Upon an indictment for obtaining by *false pretenses*, if the

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(*p*) 24 and 25 Vict., c. 96, § 41. (*q*) Ibid., § 72.

(1) Armstrong *v.* State, 21 Ohio St. 357.

(2) People *v.* March, 6 Cal. 543; Schoonover *v.* State, 17 Ohio St. 294; Estes *v.* State, 55 Ga. 131.

(3) Keedy *v.* People, 84 Ill. 569.

(4) United States *v.* Keen, 1 McLean, 429; Hurley *v.* State, 6 Ohio 399.

(5) Sargent *v.* State, 11 Ohio, 472. (6) Crim. Code, § 258

(7) Rev. Stat. (1876), vol. 2, p. 401. (8) Rev. Stat. (1877), 407.

offense turns out to amount to *larceny*, the defendant may still be convicted of false pretenses.(*r*)

And whenever a person is indicted for an offense which includes in it an offense of minor extent and gravity of the same class, the prisoner may be convicted of such minor offense.(*s*) Thus, on an indictment for murder, he may be convicted of manslaughter; so of simple larceny, if indicted for stealing in a dwelling-house, or any other aggravated form of larceny.(*t*)

If the judge is dissatisfied with the verdict, he may direct the jury to reconsider it, and their subsequent verdict will stand as the true one. If, however, the jury insist upon having the first recorded, it must be recorded; but if it be a verdict of guilty, and contrary to the evidence, it will be set aside and a new trial granted by the queen's bench division.(*u*)

[In the United States, the court in which the trial was held can, for cause, set aside the verdict of guilty, and award a new trial. When the indictment contains several counts setting out the same offense in different terms, and the verdict is guilty on one count and not guilty on the rest; or when the offense charged in a single count has several degrees, and the verdict is guilty of an inferior degree; or when the verdict is not guilty of the offense charged, but guilty of a less included offense; and the verdict is set aside, the courts are at variance as to what the defendant may be tried for at the new trial. Some courts hold that in all such cases the verdict is a unit; it is the finding of the jury upon the offense charged, and when the verdict is set aside, the jeopardy which once existed as to that offense is wholly removed, and the defendant is to be tried upon the indictment as if there never had been a trial.(1)

(*r*) 24 and 25 Vict., c. 96, § 88; v. p. 194.

(*s*) v. Rosc. 81 (*t*) v. Arch. 223. (*u*) v. p. 406.

(1) United States *v.* Harding et al., 1 Wall, Jr., 127, see p. 148; Livington's Case, 14 Gratt. 592; State *v.* Stanton, 1 Ired. Law, 424; State *v* Commissioners, 3 Hill (S. C.), 239; Bailey *v.* State, 26 Ga. 579; Jarvis *v* State, 19 Ohio St. 595; State *v.* Behimer, 20 Ohio St. 572; Ex parte Bradley, 48 Ind. 548; State *v.* Knouse, 33 Iowa, 365.

Others hold that the application of the defendant can be considered only as applying to so much of the verdict as was against him; that the acquittal is absolute, and so much of the charge as was covered by the acquittal can not be tried again, and the new trial must be restricted to that part of the charge as to which there was a conviction.(1)]

If a verdict of acquittal is returned, the prisoner is for ever free from the present accusation; and he is discharged in due course, unless there is some other charge against him. If he is acquitted on account of some defect in the proceedings, or not, as above, on the merits of the case, he may be detained and indicted afresh. If he is acquitted on the ground of insanity at the time of the commission of the offense, whether such an offense was a felony(*x*) or misdemeanor,(*y*) he must be kept in custody until the queen's pleasure be known; and the queen may order his confinement during her pleasure.(*z*)

If a verdict of guilty is brought in, the accused is said to be convicted. The jury may annex to such verdict a recommendation to mercy on any grounds they think proper, which recommendation will usually be taken into consideration by the judge.(*a*) If there are several counts in the indictment, the verdict specifies on which count the prisoner is convicted.

If there is a second indictment against a prisoner who has been found guilty, frequently it is not proceeded with, if the charge is similar to that on which he has just been convicted. The counsel for the prosecution often merely gives the court an outline of the case. If he is acquitted, the second indictment is then proceeded with, unless it

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(*x*) 39 and 40 Geo. 3, c. 94, § 1. (*y*) 3 and 4 Vict., c. 54, § 3.

(*z*) v. pp. 300 and 331, as to insanity at time of trial and not of commission of offense.

(*a*) Unless, indeed, as is not unfrequently the case, it appears that the recommendation is founded on some lingering doubt as to the sufficiency of the evidence.

(1) Hurt *v.* State, 25 Miss. 378; State *v.* Chandler, 5 La. Ann. 489 State *v.* Desmond et al., Ib. 398; Jones *v.* State, 13 Texas, 168; Barnett *v.* People, 54 Ill. 325; State *v.* Ross, 29 Mo. 32; State *v.* Martin 30 Wis. 216.

is obvious that there is no more evidence than in the first case.

If a prisoner indicted for any felony, or the offense of uttering false or counterfeit coin, or of possessing counterfeit gold or silver coin, or of obtaining goods or money by false pretenses, or of conspiracy to defraud, or of any misdemeanor under 24 and 25 Vict., c. 96, § 58,(*b*) has been found guilty, then, if he has been previously convicted of any of the above crimes, he is asked whether he has been so previously convicted, the previous conviction being also alleged in the indictment. If he admits it, the court proceeds to sentence him. But if he denies it, or will not answer, the jury are then, without being again sworn, charged to inquire concerning such previous conviction; the point to be established being the identification of the accused with the person so convicted.(*c*) The only case in which evidence of a previous conviction may be given before the subsequent conviction is found is when the prisoner gives evidence of character. In this case the jury are to inquire of the previous conviction and the subsequent offense at the same time.(*d*)

(*b*) v. p. 243.

(*c*) 34 and 35 Vict., c. 112, §§ 18, 20; see also 24 and 25 Vict., c. 96, § 116; c. 97, § 37.

(*d*) Arch. 231. Though the previous conviction does not fall within the scope of the above provision, the judge has before him a record of it, and all other occasions on which the accused has been before a criminal court. See p. 182, as to evidence of certain previous convictions on an indictment for receiving.

CHAPTER XIX.

JUDGMENT.

BEFORE judgment, in cases of treason and felony, the prisoner is supposed to be asked whether he has any thing to say why the court should not proceed to pass sentence upon him. But, in actual practice, this is not always done.

The interval between conviction and judgment is the time for the defendant to move the court in *arrest of judgment*. The motion must be grounded on some defect apparent on the face of the record, and not on some irregularity in the proceedings. The objection must be a substantial one, such as want of sufficient certainty in the indictment as to the statement of facts, etc. But judgment will not be arrested, if the defect has been amended during the trial, or is such an one as is aided by verdict. The court itself will arrest judgment, if it is satisfied that the defendant has not been found guilty of any offense in law. If judgment is arrested, the proceedings are set aside, no judgment is given, and the prisoner is discharged. But, unlike an ordinary acquittal, the defendant may be indicted again on the same facts.

[In Ohio, a motion in arrest of judgment may be granted, if the grand jury which found the indictment had no legal authority to inquire into the offense charged, by reason of it not being within the jurisdiction of the court; or if the facts stated in the indictment do not constitute an offense.(1) The provision in the statute of Indiana is the same.(2) In Kentucky, the only ground upon which a judgment shall be arrested is that the facts stated in the indictment do not constitute a public offense within the jurisdiction of the

(1) 66 Ohio L. 359. (2) Rev. Stat. (1876), vol. 2, pp. 409, 410.

court.(1) In Iowa, judgment may be arrested upon any ground which would have been ground of demurrer; and also when, upon the whole record, no legal judgment can be pronounced.(2) In Kentucky, Indiana, and Iowa, the court may, without motion by defendant, arrest judgment upon the same grounds. In all four states, if the court is of opinion, upon the evidence, that he is guilty of an offense, the defendant shall be held for further indictment.

In Ohio, motion in arrest of judgment can not be made after three days after the verdict is rendered. In Kentucky and Iowa, the motion can be made at any time before judgment, or after judgment at the same term.]

Judgment may be postponed, if the court wishes to reserve any point of law for the consideration of the court for crown cases reserved.(*e*)

If the defendant has been found guilty of a misdemeanor, in his absence (in felonies, he must be present), process issues to bring him to receive judgment; and, on non-appearance, he may be prosecuted to outlawry.(*f*) If he has been allowed to leave the court, on entering into recognizances to come up for judgment when called for, and he fails to come up, his recognizances will be forfeited, and a warrant issued for his apprehension.

Judgment or sentence is given by the court, the judge adding such remarks as he thinks proper. Formerly, in all capital felonies, when the court thought that the person convicted was a fit subject for royal mercy, it was lawful, instead of publicly giving sentence of death, to enter it on the record, the effect being the same.(*g*) But it seems that now, by virtue of 24 and 25 Vict., c. 100, § 2, sentence of death must be pronounced on conviction for murder.

[The right to include several counts in an indictment for felony is limited to presenting the same transaction in different forms. A general verdict on such an indictment is therefore a finding of guilty of a single transaction. As

(*e*) v. p. 410. (*f*) v. p. 291.

(*g*) v. 4 Geo. 4, c. 48, § 1; 6 and 7 Wm. 4, c. 30, § 2; 24 and 25 Vict., c. 95.

(1) Crim. Code, § 276. (2) Rev. Stat. (1873), p. 693.

such a verdict finds proved all the material averments well charged, the sentence, while it can be for only one offense, may be for the highest offense well charged.(1) But, in Pennsylvania, it was held that where the counts charge several offenses committed in a single transaction—as a breaking with intent to steal and an actual larceny—there may be separate sentences on the separate counts.(2) And, in Massachusetts, where, contrary to the prevailing rule, distinct felonies, committed at different times, may be charged in one indictment,(3) there may be, in such case, on a general verdict of guilty, a single sentence, awarding the aggregate punishment that could be imposed for the separate offenses.(4) When sentence has been pronounced upon a general verdict of guilty, and it appears that some of the counts are good and some bad, the sentence is held to apply to and be supported by the good counts, and be valid. The ruling to the contrary, that the sentence, in such cases, is erroneous, made by the majority of the house of lords, in O'Connell's case, 11 Cl. & Fin. 15, made under the stress of political circumstances, excited surprise in the profession in England, and has not been followed in this country.

The rule of pleading above stated is modified by the statutes which permit several distinct larcenies or embezzlements to be charged in one indictment.

Several distinct misdemeanors may be joined in one indictment. But it was held, in New York, that, upon a verdict of guilty of all, the sentence can not be greater than if there were but a single count.(5)]

(1) Commonwealth *v.* Hope, 22 Pick. 1; Commonwealth *v.* Kirby, 2 Cush. 577; People *v.* McGeery, 6 Parker, C. C. 653; People *v.* Bruna Ib. 657; Manly *v.* State, 7 Md. 135; Bullock *v.* State, 10 Ga. 47.

(2) Commonwealth *v.* Burdsall, 69 Penn. St. 482.

(3) Commonwealth *v.* Hills, 10 Cush. 530.

(4) Carleton *v.* Commonwealth, 5 Metc. 532.

(5) Tweed *v.* People, 60 N. Y. 559.

CHAPTER XX.

INCIDENTS OF TRIAL.

SOME miscellaneous points connected with a criminal trial remain to be noticed, now that we have viewed the general order of proceedings.

Defense in forma pauperis.—In cases of extreme poverty (that is, when the defendant will swear that he is not worth £5 in the world, besides his wearing apparel, after paying his debts) the defendant may petition the queen's bench division to be allowed to defend himself as a pauper. His petition must be verified at the same time by an affidavit. It (the petition) is presented either to a judge at chambers or in court. On the prayer of the petition being granted, a rule is drawn up by the judge's clerk, mentioning the name of the counsel and attorney assigned for the defense; and this must be produced when the pauper requires any thing to be done without payment of fees.(*h*)

There is also a custom of a similar nature. In cases where there is a special difficulty, or where the consequences are very serious, and therefore usually on indictments for murder, if the prisoner is not defended by counsel, the judge requests some barrister to give his honorary services to the prisoner. Of course this request is always complied with.

[In Ohio,(1) Illinois,(2) and Iowa,(3) the court assigns counsel to defendants who are too poor to employ any. Counsel, as used in these statutes, includes counsel, attorney, and barrister, named in the text, there being no distinction in most of the states between attorneys and barristers.]

(*h*) Arch. 151. R. *v.* Dugdale, Corner's Cr. Prac. 167.

(1) 66 Ohio L. 340. (2) Rev. Stat. (1877), p. 405.

(3) Rev. Stat. (1873), p. 673.

Sometimes a poor person is allowed to prosecute *in forma pauperis*, but then, in addition to the petition and affidavit, there must be special grounds shown for allowing this irregularity.(*i*)

View of locus in quo by the jury.—The judge may allow the jury to view the scene of the crime, or other occurrence under investigation, at any time during the trial, even after the summing up. But care should be taken that no improper communications are made at the view; and that no evidence is received in the absence of the judge and the prisoner.(*k*)

Adjournment of the trial.—If the trial is not concluded on the same day on which it is commenced, the judge may adjourn from day to day.(*l*) And a judge may adjourn a case and proceed with another if the emergency requires it, as, for example, to give time for the production of something essential to the proof, or for the witnesses to arrive.(*m*) If the prisoner is taken so ill as to render him incapable of remaining at the bar, the jury is discharged, and the prisoner is afterward tried by another jury.(*n*)

Withdrawal from prosecution.—Frequently the prosecutor is desirous of withdrawing from the prosecution, the accused engaging not to bring an action for trespass and false imprisonment or malicious prosecution. If the offense is a misdemeanor more immediately affecting the individual, *e. g.*, a battery, or, in other words, one which might be made the subject of civil action, this will be allowed, and the agreement will be enforced; but not if the offense is a felony or a misdemeanor of a more public nature.(*o*) Even after verdict, if the court deems such a course proper, the defendant is sometimes allowed to "talk with the prosecutor." Though one person is not obliged in the first in-

(*i*) Arch. 151. R. *v.* Wilkins, 1 Dowl. P. C. 536.

(*k*) R. *v.* Martin, L. R., 1 C. C. R. 378; 41 L. J. (M. C.) 113.

(*l*) As to what happens to the jury in the interval, v. p. 327.

(*m*) R. *v.* Wenborn, 6 Jur. 167.

(*n*) R. *v.* Stevenson, 2 Leach, 546.

(*o*) v. Rawlings *v.* Coal Consumers' Association, 43 L. J. (M. C.) 111

stance to prosecute another whom he suspects of crime, that is, not until he has been bound over by the magistrate to prosecute and give evidence, it is a crime to take a reward not to prosecute a felony.(*p*)

[In Iowa, when a defendant is prosecuted in a criminal action for a misdemeanor, for which the person injured by the act constituting the offense has a remedy by civil action, the offense may be compromised, except when it is committed by or upon an officer while in the execution of the duties of his office; or riotously; or with intent to commit a felony. The party injured must acknowledge in writing, in court, before trial, that he has received satisfaction. Thereupon, on payment of costs, the court may, in its discretion, discharge the defendant, which discharge is final, and a bar to another prosecution for the same offense.(1)]

Restitution of goods.—When a man's goods have been stolen, he may, if he can do so without a breach of the peace, retake them wherever he finds them,(*q*) as the goods are still his, unless they have been sold and bought in market overt, by which sale a *bona fide* purchaser acquires the property in the goods. In that case the original owner is entitled to have his goods back only after he has prosecuted the thief to conviction; and that only in consequence of the provisions of the Larceny Consolidation Act.

If any person guilty of any such felony or misdemeanor as is mentioned in that act, in stealing, taking, obtaining, extorting, embezzling, converting, or disposing of, or in knowingly receiving, any chattel, money, valuable security or other property, is indicted for such offense by or on behalf of the owner of the property, or his executors, or administrators, and convicted thereof; in such case the property is to be restored to the owner or his representative. The court may order the restitution in a summary manner. But no such restitution is made if it appears that any valuable security has been *bona fide* paid or discharged by some person or body corporate liable to the payment thereof, or, being a negotiable instrument, has been *bona fide* taken or received by transfer or delivery,

(*p*) v. compounding felony, p. 85. (*q*) 4 Bl. 363.
(1) Rev. Stat. (1873), p. 721.

by some person or body corporate, for a just and valuable consideration, without any notice or reasonable cause to suspect that the same had, by any felony or misdemeanor, been stolen, etc. But the above provisions as to restitution do not apply to the case of any prosecution of any trustee, banker, merchant, solicitor, factor, broker, or other agent intrusted with the possession of goods or documents of title to goods, for any misdemeanor against the Larceny Act.(*r*) But the court has not power, as a rule, to order property not forming part of the subject of the indictment, for example, property found on the prisoner, to be disposed of in a particular manner.(*s*)

The effect of this statute is to revest the property in the goods in the original owner from the time of the conviction, so that he may bring an action to recover his goods against any one who had possession of them after the conviction,(*t*) but not against a person who, having bought them in market overt, parted with them before such conviction.(*u*) Or the owner may obtain a summary order for restitution under the statute.

Now, as we have seen that there is a distinction, in the case of goods which have been stolen and afterwards sold, between a sale in market overt and a sale otherwise, on which depends the right to recover by the aid of the statute only, or without it; so similarly with regard to goods which have been obtained from the owner by false pretenses, different considerations apply according as the property has or has not passed from the original owner.

Thus, for example, when A. is induced by fraud to part with his goods to B., under the belief that he is selling the goods to some person whom B. pretends to be, or to be the agent of, the contract is void, and the property in the goods has never passed from A., and he is therefore entitled, apart from the statute, to recover his goods, or sue for the conversion of them.(*x*) But when A. has been in-

(*r*) 24 and 25 Vict., c. 96, s 100.
(*s*) R. *v.* Corporation of London, 27 L. J. (M. C.) 231. But an exception is introduced by statute 30 and 31 Vict., c. 35, s. 9.
(*t*) Scattergood *v.* Sylvester, 15 Q. B. 506.
(*u*) Horwood *v.* Smith, 2 T. R. 750.
(*x*) Hardman *v.* Booth, 1 H. & C. 803; 32 L. J. (Ex.) 105; Lindsay *v.*

duced by fraud to sell or part with his goods to B., intending to pass the property to him, the contract is not void, but voidable; *i. e.*, A. may repudiate the contract on discovering the fraud, and may recover the goods from B., or from a purchaser who had notice of the fraud. But if B. has sold the goods to C., an innocent purchaser, A. can not recover the goods from C., because the property in the goods passed to him while B. had the property, and so C. has acquired a good title, unless the statute gives A. the right to recover.

The words of the statute seem to have that effect, and were so considered by Blackburn, J., in Lindsay *v.* Cundy.(*y*) And it is difficult to see any reason why a person who has bought in market overt *bona fide*, but from a thief, should be in a worse position than one who has simply purchased from one who has obtained the goods by fraud. However, it has been decided, in the recent case of Moyce *v.* Newington,(*z*) that the statute does not apply to cases of false pretenses where the property has passed, but only to those cases where possession has been obtained without the property passing, cases in which, as we have seen, the statute is unnecessary, except for the purpose of giving a summary mode of obtaining restitution.

The innocent purchaser is not, however, always a total loser; for it is provided that money found on a prisoner, who has been convicted of an offense which includes the stealing of any property, may be ordered by the court to be given to the purchaser of the property, if he did not know that the same was stolen. This takes place only after he has restored the property to the owner; and of course the amount so given must not exceed the amount of the proceeds of the sale.(*a*) If the property has been pawned, the court may order the delivery thereof to the owner, either on payment to the pawnbroker of the amount of the loan or of any part thereof, or without payment of any part, as the court, according to the conduct of the owner and the other circumstances of the case, thinks just and fitting.(*b*)

Restitution may be ordered in the same way by magistrates convicting of larceny, etc., in the exercise of their summary jurisdiction.(*c*)

Cundy, L. R. 1 Q. B. D. 348; 45 L. J. (Q. B.) 381; L. R. 2 Q. B. D. 96; 46 L. J. (Q. B.) 233; L. R. 3, Appeal Cases, 459; 47 L. J. (H. L.) 481.

(*y*) L. R. 1 Q. B. D. 357.

(*z*) L. R. 4 Q. B. D. 32; 48 L. J. (Q. B.) 125.

(*a*) 30 and 31 Vict., c. 35, s. 9.

(*b*) 35 and 36 Vict., c. 93, s. 30.

(*c*) 42 and 43 Vict., c. 49, s. 27. subs. 8.

CHAPTER XXI.

PUNISHMENT.

THE object of the sentence is to prescribe the punishment. The law, whether common law or statute law, which assigns the punishment, almost unexceptionally gives the judge a certain latitude as to the amount of punishment. Though he is restricted as to the maximum, in almost every case he can give as little as he pleases, minimum punishments having been abolished by statute.(*y*) On conviction for treason or murder, however, sentence of death must be passed. Crimes against nature must be punished by at least ten years' penal servitude. Some crimes demand a wide limit of punishment; for example, manslaughter, where it may range from penal servitude for life to a merely nominal punishment according to the circumstances. But practically this works well, as the judges are quite competent to apportion the punishment to the crime; and the inconvenience of reposing that confidence in them is a less evil than the multiplication of technical distinctions which inevitably results from the multiplication of the definitions of crime.(*a*)

The punishment prescribed by statute for *felonies* is usually penal servitude for not less than five years, or imprisonment not exceeding two years with or without hard labor. When the punishment is not prescribed by statute, the combined effect of several statutes(*b*) is, that such felonies may be punished by penal servitude for not more than seven nor less than five years, or by imprisonment for any term not exceeding two years; and, if a male, the court

(*y*) 9 and 10 Vict., c. 24.

(*a*) Fits. St. 143.

(*b*) 7 and 8 Geo. 4, c. 28, § 8 (see also § 9); 20 and 21 Vict., c. 3, § 2; 27 and 28 Vict., c. 47, § 2.

may order the felon to be once, twice, or thrice publicly or privately whipped in addition to such punishment.

The punishment prescribed by statute for *misdemeanors* is usually fine or imprisonment, or both; and it is also the same when it is not prescribed by statute, but left to the common law.(*c*) The court may also require the defendant to find sureties to keep the peace and be of good behavior.

The punishment for a felony (not punishable with death and not being simple larceny), after a previous conviction for felony, is penal servitude for life or for not less than seven years, or imprisonment not exceeding two years; and in the case of a male, if the court thinks fit, whipping publicly or privately, once, twice, or thrice.(*d*)

Special enactments impose certain terms of punishment in the case of conviction for *simple larceny* after previous conviction for certain offenses. The punishment for simple larceny, after previous conviction for felony, is penal servitude from seven to ten years, or imprisonment not exceeding two years, with or without hard labor, or solitary confinement; and in the case of a male under sixteen years of age, with or without whipping.(*f*) For simple larceny, or any offense made punishable as simple larceny by the larceny act, after previous conviction for any indictable misdemeanor under the larceny act, the punishment is penal servitude from five to seven years, or imprisonment as in the last case.(*g*) The same limits of punishment apply to simple larceny, or an offense punishable as simple larceny, after two summary convictions for offenses punishable upon summary conviction under certain enumerated acts.(*h*)

(*c*) As to hard labor, v. p. 400.

(*d*) 7 and 8 Geo. 4, c. 28, § 11; 20 and 21 Vict., c. 3, § 2; 27 and 28 Vict., c. 47, § 2.

(*f*) 24 and 25 Vict., c. 96, § 7.

(*g*) Ibid., § 8.

(*h*) Ibid. § 9.

For uttering, etc., counterfeit coin, after previous conviction for such crime, or previous conviction for a felony against a coinage act, the punishment is penal servitude for life, or for not less than five years, or imprisonment not exceeding two years, with or without hard labor, or solitary confinement.(*i*)

We may notice here that if the prisoner is found guilty of several distinct offenses on different counts, he may be sentenced to several terms of punishment; such terms to be concurrent, or the second to commence at the expiration of the first. When a sentence for felony is passed on a person already suffering imprisonment for another crime, the court may order the imprisonment for the subsequent offense to commence at the expiration of the former term; so also the court may order a sentence of penal servitude to commence after the previous imprisonment or penal servitude, although the aggregate term of imprisonment or penal servitude respectively may exceed the term for which either of these punishments could be otherwise awarded.(*k*)

The punishments which the law prescribes are the following:

Death; penal servitude; imprisonment; fine.

Incidental to the imprisonment are sometimes

Hard labor; whipping; solitary confinement.

In addition to other punishment there is often made an order that the person convicted be under police supervision for a certain time.

Again, in some cases the ends of justice are attained by requiring the prisoner to enter into recognizances to come up for judgment if called for; which generally means that if he conducts himself with propriety he will hear nothing more of the matter.

The prisoner may also be required to find sureties to keep the peace, or to be of good behavior.

Youthful offenders, under certain circumstances, may be sent to reformatories or industrial schools.

(*i*) 24 and 25 Vict., c. 99, § 12. (*k*) 7 and 8 Geo. 4, c. 28, § 10.

Each of the above-named sanctions of the law will in turn receive a brief notice.

Death.—This is the only punishment which must be awarded in treason and murder. And it can not be awarded in any other cases except piracy, or the two crimes of setting fire to her majesty's vessel of war or to ships, etc., in the port of London.(*l*)

Penal servitude.—This mode of punishment was introduced in substitution for transportation beyond the seas in certain cases by 16 and 17 Vict., c. 99, and totally superseded transportation by 20 and 21 Vict., c. 3. It was placed generally on the same footing as the latter punishment: thus, any person who might formerly have been sentenced to transportation is now liable to be kept in penal servitude for the same period; and any person who might have been sentenced either to transportation or imprisonment may now be sentenced either to penal servitude or imprisonment. But in cases where before the act sentence of seven years' transportation might have been passed, the court may now pass sentence of not less than five years' penal servitude.(*m*)

Persons sentenced to penal servitude may be confined in any prison, or place of confinement in any part of the United Kingdom, or in any river, port, or harbor of the United Kingdom, in which persons under sentence or order of transportation might formerly be confined, or in any other prison in the United Kingdom, or in her majesty's dominions beyond the sea, as one of her majesty's secretaries of state may direct. And in other respects, as to custody, hard labor, management, control, property in their services, and punishment for unlawfully being at large before the expiration of their term,(*n*) they may be dealt with as persons sentenced to transportation formerly were.(*o*)

The shortest term of penal servitude which can be

(*l*) As to recording sentence, v. p. 389; as to mode of execution, v. p. 419.

(*m*) 20 and 21 Vict., c. 3, § 2; 27 and 28 Vict., c. 47, § 2.

(*n*) v. p. 70.

(*o*) 16 and 17 Vict., c. 99, § 6; 20 and 21 Vict., c. 3, § 3.

awarded is five years; or, after a previous conviction for felony, seven years.(*p*)

Imprisonment.—As a general rule, no longer sentence of imprisonment than for two years can be awarded. From that to penal servitude (if allowed in the particular case) for five years there is a spring. But under some statutes still in force, imprisonment to the extent of three or four (or even more) years may be awarded; for example, under 24 and 25 Vict., c. 134, § 221; 24 and 25 Vict., c. 98, § 11; 7 Wm. 4 and 1 Vict., c. 36, § 26; 2 Geo. 2, c. 25, § 2.

Fine.—In offenses punishable by fine, usually the amount of the fine is not restricted by statute. The reason of this is obvious. Not only does the value of money change from time to time, but a fine which would be ruin to one man would be matter of indifference to another.(*q*) The bill of rights provides that excessive fines shall not be imposed. It would be imprudent to hinder a man from getting his livelihood; and if the crime demands more severe punishment, the court may award imprisonment, for it is generally empowered to award either the one or the other, and frequently both. Felonies are very rarely punished by mere fine.(*r*) Each of the criminal consolidation acts, 1861, provides that a person convicted of a misdemeanor under those acts may be fined in addition to or in lieu of other punishment.(*s*)

Hard labor.—This punishment may be added in nearly all cases to imprisonment for *felony*. The *misdemeanors* to the imprisonment for which hard labor may be added are enumerated in 3 Geo. 4, c. 114, and 14 and 15 Vict., c. 100, § 29. Each of the criminal consolidation acts, 1861, contains a clause to the effect that the court may add hard labor to imprisonment in case of indictable offenses, *felonies* or *misdemeanors*, under those acts.(*t*) Also in offenses

(*p*) 27 and 28 Vict., c. 47, § 2. (*q*) 4 Bl 378.

(*r*) v. 24 and 25 Vict., c. 100, § 5.

(*s*) 24 and 25 Vict., c. 96, § 117; c. 97, § 73; c. 98, § 51; c. 99, § 38; c. 100, § 71.

(*t*) 24 and 25 Vict., c. 96, § 118; c. 97, § 74; c. 98, § 52; c. 99, § 39; c. 100, § 69.

under the post-office acts for which imprisonment may be awarded, the court may add hard labor.(*u*) So that in nearly every case now hard labor may accompany imprisonment.

Two classes of hard labor are distinguished—one for the employment of males above the age of sixteen; the other for that of males below that age and of females. Regulations as to its nature and application are made by statute.(*x*)

Whipping.—Two classes of cases in which whipping is allowed must be distinguished:—(i.) of males below the age of sixteen; (ii.) of males of an age. It should be premised that a female can never be whipped. Where formerly sentence of whipping might be passed, the court or magistrate may now order the female to be kept to hard labor for a term not exceeding six months nor less than one month, in lieu of the whipping.(*y*)

i. By three of the consolidation acts whipping may be inflicted for a variety of specified offenses committed by males under the age of sixteen, and in one case, males under the age of eighteen.(*z*) It is to take place once, and the number of strokes and the instrument with which they are to be inflicted are to be specified by the court in the sentence.(*a*)

When this punishment is awarded by the magistrates in the exercise of their summary jurisdiction, the sentence must specify the number of strokes and the instrument; and in the case of an offender whose age does not exceed fourteen, the number of strokes must not exceed twelve, and the instrument used must be a birch rod. The offender must not be whipped more than once for the same offense.(*b*)

(*u*) 7 Wm. 4, and 1 Vict., c. 36, § 42.

(*x*) 28 and 29 Vict., c. 126, § 19, and part 4, sched. i, regs. 34–37.

(*y*) 1 Geo. 4, c. 57, § 2.

(*z*) 24 and 25 Vict., c. 96, § 101. This exception is probably a mere oversight on the part of the legislature.

(*a*) 24 and 25 Vict., c. 96, § 119; c. 97, § 75; c. 100, § 70.

(*b*) 25 and 26 Vict., c. 18.

ii. Whipping once, twice, or thrice, may be awarded to males of any age in case of:

(a.) Robbery, etc., with violence—or an attempt to choke, suffocate, or strangle. The following regulations must be observed: The whipping must be privately inflicted; (b) if the age of the offender does not exceed sixteen, the number of strokes at each whipping must not exceed twenty-five, and instrument must be a birch rod; (c) in other cases not the more than fifty strokes at a whipping; (d) the court must specify the number of strokes and the instrument; (e) the whipping must not take place after six months from the sentence; (f) in the case of a person sentenced to penal servitude, the whipping must be inflicted before he is removed to a convict prison.(*c*)

(b.) Felony, after a previous conviction for felony; and certain offenses relating to the falsifying of certificates of previous conviction. The whipping is to be publicly or privately inflicted.(*d*)

(c.) Felony for which no particular punishment has been provided.(*e*)

Solitary confinement.—This may be ordered in certain specified cases mentioned in the criminal consolidation acts. Also for felonies for which no particular punishment has been prescribed by statute;(*f*) and for certain other offenses which it is unnecessary to enumerate. But in no case may a prisoner be kept in solitary confinement for any longer period than one month at a time, or than three months in the space of one year.(*g*)

Police supervision.—When any person is convicted on an indictment for a *crime* (explained by the act to mean in England—any felony, or the offense of uttering false or counterfeit coin, or of possessing counterfeit gold or silver coin, or of obtaining by false pretenses, or of conspiracy to defraud, or of any misdemeanor under 24 and 25 Vict., c. 96, § 58), and a previous conviction of a crime is proved

(*c*) 26 and 27 Vict., c. 44. (*d*) 7 and 8 Geo. 4, c. 28, § 11.
(*e*) Ibid., § 8. (*f*) Ibid., § 9.
(*g*) 7 Wm. 4, and 1 Vict., c. 90, § 5; 24 and 25 Vict., c. 96, § 119; c. 97, § 75; c. 98, § 53; c. 99, § 40; c. 100, § 70.

against him, the court may, in addition to any other punishment, direct that he is to be the subject of the supervision of the police for a period of seven years or less, commencing immediately after the expiration of the sentence passed on him for the last of such crimes.(*h*)

The consequence of such sentence is that the person to be supervised must notify the place of his residence to the chief officer of police of the district in which his residence is situated, and also notify any change within such district; and if he goes out of the district, he must notify the change to the chief officer of the district he is leaving, and also to the chief officer of the district to which he is going. If a male, he must report himself personally or by letter, as required, once a month to the chief officer of the district. If he offends against these regulations, or is forty-eight hours in any place without notifying the place of his residence to the chief officer, he is subject to imprisonment with or without hard labor for a term not exceeding one year.(*i*)

Recognizances and sureties.—Under each of the criminal consolidation acts, in case of conviction for an indictable *misdemeanor* punishable under those acts, the court may fine the offender, and require him to enter into his own recognizances and to find sureties, both or either, for keeping the peace and being of good behavior, in addition to to or in lieu of any other punishment. In case of a felony punishable under the acts, the court may order him to enter into his own recognizances and to find sureties, both or either, for keeping the peace, in addition to any other punishment. But under these clauses no one may be imprisoned for not finding sureties for any period exceeding one year.(*k*)

Reformatory and industrial schools.—When any offender who, in the judgment of the court or magistrates, is under the age of sixteen years, is convicted of an offense punishable by penal servitude or imprisonment, and is sentenced to impris-

(*h*) 34 and 35 Vict., c. 112, § 8. (*i*) Ibid.

(*k*) 24 and 25 Vict., 96, § 117: c. 97, § 73; c. 98, § 51; c. 99, § 38; c. 100, § 71.

onment for ten days or more, the court or magistrates may also sentence him to be sent, after his imprisonment, to a certified *reformatory* school, to be there detained for a period of of from two to five years. But if he is under the age of ten years he may not be sent to the reformatory unless he has been previously charged with some offense punishable by penal servitude or imprisonment; or is sentenced by a judge of assize or a court of general or quarter sessions. The court sending such a youthful offender to a school will choose one of his apparent religious persuasion.(*l*)

Industrial schools meet the case of those who have not to so great an extent fallen into crime, but are on the high-way to it. Thus, two magistrates may send the following, among others, to such schools: children apparently under the age of *fourteen* begging, having no home or visible means of existence, in the company of reputed thieves; destitute orphans, or having a surviving parent in penal servitude or imprisonment; children apparently under the age of *twelve* charged with an offense punishable by imprisonment or less punishment, but not having been convicted of felony, etc. No child is detained in such school after he has attained the age of sixteen, unless with his own consent expressed in writting.(*m*)

Other consequences of conviction.

Until recently certain forfeitures and other consequences followed on conviction for treason or felony. But by statute(*n*) it has been provided that from and after the passing of the act (July 4, 1870) no confession, verdict, inquest, conviction, or judgment of or for any treason, felony, or *felo de se*, shall cause any *attainder or corruption of blood*, or any *forfeiture*, or *escheat;* provided that nothing in the act shall affect the law of forfeiture consequent upon outlawry. Of course this does not refer to, or interfere with, any fine or penalty imposed in the sentence.(*o*)

But a conviction for treason or felony for which the sentence is death, penal servitude, or imprisonment with hard

(*l*) 29 and 30 Vict., c. 117, § 14.
(*m*) Ibid., c. 118.
(*n*) 33 and 34 Vict., c. 23, § 1.
(*o*) Ibid., § 5.

labor, or exceeding twelve months, determines the tenure of any military or naval office, or any civil office under the crown, or other public employment, or any ecclesiastical benefice, or any office or emolument in any university or other corporation, or any pension or superannuation allowance payable by the public, or out of the public funds, unless a pardon is received within two months after the conviction, or before the filling up of the office, place, etc., if given at a later period. It also disqualifies for the future, until the punishment has been suffered or pardon received, the felon from holding any military or naval office, or any civil office under the crown, or other public employment, or any ecclesiastical benefice, or of being elected, or sitting, or voting as a member of either house of parliament, or of exercising any right of suffrage or other parliamentary or municipal franchise within England, Wales, or Ireland.(*p*)

As to the *property* of the felon.—By the same statute(*q*) it is provided that this may be committed to the custody and management of an administrator, to be appointed by the crown; or, in default of such appointment, to the management of an *interim* curator, who may be appointed by the magistrates on an application made in the interest of the felon or his family. The administrator or curator must pay his debts and liabilities, and support his family, and preserve the residue of the property for the felon himself or his representatives, on the completion of his punisnment, his pardon, or his death.

Persons convicted of treason or felony may be condemned in *costs*; and if convicted of felony may be ordered to pay a sum of money, not exceeding £100, as compensation to the person defrauded or injured by the commission of the felony.(*r*)

(*p*) 33 and 34 Vict., c. 23, § 2. (*q*) Ibid., §§ 9, 18, 21.
(*r*) Ibid., §§ 3, 4.

CHAPTER XXII.

PROCEEDINGS AFTER TRIAL.

THOUGH there is no appeal on the merits in a criminal case, the verdict of the jury does not always determine the conviction or acquittal of the prisoner. We have already seen(*s*) that judgment may be arrested on certain grounds. It remains to consider those cases in which the judgment, though actually given, is subsequently affected. This matter will be treated of under the heads of new trial, reversal of judgment by writ of error, and the court for crown cases reserved. The subject of reprieve and pardon will form a separate chapter.

NEW TRIAL.

"Where an indictment has been preferred in the queen's bench, or has been removed into that court by *certiorari*, a new trial may, after *conviction*, be moved for, on the ground that the prosecutor has omitted to give due notice of trial; or that the verdict has been contrary to evidence, or to the direction of the judge; or for the improper reception or rejection of evidence, or other mistake or misdirection of the judge; or for any gross misbehavior of the jury among themselves; or for surprise; or for any other cause where it shall appear to the court that a new trial will further the ends of justice.(*t*)

It is now settled that only in misdemeanors, and not in felonies, can a new trial be granted.(*u*) As a rule, after a verdict of acquittal, a new trial will not be granted; but this rule is subject to qualifications—for example, where the defendant has kept back witnesses for the prosecution; or where the object of the criminal proceeding is to try a

(*s*) v. p. 388. (*t*) Arch. 188.
(*u*) R. *v.* Bertrand, L. R. 1 (Priv. Counc.) 520.

right, as in the case of a prosecution for the non-repair of roads.(x)

Only in case of some irregularity in the proceedings, or, in other words, a mis-trial, can any other court than the queen's bench grant a new trial, the mis-trial being regarded as a mere nullity.

The motion for a new trial is made upon the judge's notes of the trial, or upon affidavit, the defendant being present in court. When counsel have been heard on both sides, the court either makes the rule absolute or discharges it, with or without costs. If the new trial is granted, the effect of the former trial is completely swept away, and all the facts are re-heard.

[In the United States, new trials, after a verdict of conviction, are granted by the court in which the verdict is returned, upon the same principles which regulate the granting of new trials in civil cases. In some states, the grounds for which a new trial may be granted are defined by statute. In Ohio, the grounds, as defined by statute, are: 1. Irregularity in the proceedings of the court, jury, or the prosecuting attorney, or the witnesses for the state, or for any order of court, or abuse of discretion, by which the defendant was prevented from having a fair trial. 2. Misconduct of the jury, or of the prosecuting attorney, or of the witnesses for the state. 3. Accident or surprise, which ordinary prudence could not have guarded against. 4. That the verdict is not sustained by sufficient evidence, or is contrary to law. 5. Newly discovered evidence, material for the defendant, which he could not, with reasonable diligence, have discovered and produced at the trial. 6. Error of law, occurring at the trial.(1)

In Kentucky, the grounds are: 1. If the trial, in a case of felony, were commenced and completed in his absence. 2. If the jury have received any evidence out of court, other than that resulting from a view, as provided in this code. 3. If the verdict have been decided by lot, or in any other manner than by a fair expression of opinion by the

(x) v. R. v. Chorley, 12 Q. B. 515.

(1) 74 Ohio L. 358.

jurors. 4. If the court have misinstructed, or refused properly to instruct the jury. 5. If the verdict be against the law or evidence. 6. If the defendant have discovered important evidence in his favor since the verdict. 7. If, from misconduct of the jury, or from any other cause, the court be of opinion that the defendant has not received a fair and impartial trial. Members of the jury can testify that the verdict was made by lot.(1)

There are statutory provisions of the same character in Indiana(2) and Iowa.(3) In Michigan, a new trial may be granted for any cause for which, by law, a new trial may be granted, or when it shall appear to the court that justice has not been done, and on such terms and conditions as the court shall direct.(4)]

REVERSAL OF JUDGMENT BY WRIT OF ERROR.

As a rule, the only way in which judgment can be reversed is by writ of error, though such writ is not necessary if the objection is to some matter *dehors*, or foreign to the record, as if judgment be given by persons who have no authority.

A writ of error is a writ directed to an inferior court which has given judgment against the defendant, requiring it to send up the record and proceedings of the indictment in question to the queen's bench division, for that court to examine whether the errors alleged took place, and to affirm or reverse the judgment of the inferior court. It must be grounded on some substantial defect, apparent on the face of the record, as if the indictment be bad in substance, or the sentence be illegal. It will never be allowed for a formal defect.(*y*) The following are examples of cases where it has been held that a writ of error would lie: In perjury, where the court has not competent authority to administer the oath; in libel, if the words do not appear to

(*y*) v. 14 and 15 Vict., c. 100, § 25.

(1) Crim. Code, §§ 271, 272. (2) Rev. Stat. (1876), vol. 2, p. 409

(3) Rev. Stat. (1873), p. 692. (4) Rev. Stat. (1871), p. 2179.

be libelous; in false pretenses, if it is not shown what the false pretenses were.(*z*)

Before suing out the writ of error, it is necessary to obtain the fiat of the attorney-general, on showing reasonable ground of error. This is at the discretion of the attorney-general, but is not generally refused; indeed, in misdemeanors, it is granted as a matter of course. The writ is delivered to the clerk of the peace, or other officer of the court to which it is directed, who has the custody of the indictment. He makes up the record, and makes out the return to the court. The party suing assigns his errors. The crown joins in error. The case is argued, and judgment of affirmance or reversal given. The court of error may either pronounce the proper judgment itself, or remit the record back to the inferior court, in order that the latter may pronounce judgment.(*a*)

If judgment is affirmed, the defendant may be at once committed to prison; and if he does not surrender within four days, a judge may issue a warrant for his apprehension.(*b*)

If judgment is reversed, all the former proceedings are null and void, and the defendant is in the same position as if he had never been charged with the offense; therefore, he may be indicted again on the same ground.

In the interval before the result of the proceedings in error is known, in cases of misdemeanor, the defendant is discharged from custody on entering into the recognizances with sureties required by the acts mentioned below; in felonies, he remains in custody.(*c*)

The jurisdiction in error, in criminal cases, is thus regulated by the supreme court of judicature acts. On a judgment of the high court of justice (including the queen's bench division, commissions of jail delivery, and oyer and terminer), an appeal lies to the court of appeal, if there is some error of *law* apparent on the face of the record, as to

(*z*) v. Castro *v.* Murray, 32 L. T. (N. S.) 675.

(*a*) 11 and 12 Vict., c. 78, § 5. (*b*) 16 and 17 Vict., c. 32, § 4.

(*c*) 8 and 9 Vict., c. 68, § 1; 9 and 10 Vict., c. 24, § 4; 16 and 17 Vict., c. 32, § 1.

which no question has been reserved under 11 and 12 Vict. c. 78.(*d*) And, as to appeals from quarter sessions and other inferior courts, which might have been brought to any court or judge whose jurisdiction is transferred to the high court of justice, it is provided that they may be heard and determined by divisional courts of the high court, consisting of judges who may be assigned for that purpose. The determination of such appeals, respectively, by these divisional courts, is final, unless special leave to appeal to the court of appeal is given by the divisional court so hearing.(*e*)

COURT FOR CROWN CASES RESERVED.

If any question of law arises at a trial for treason, felony, or misdemeanor, which the court (whether a judge at the assizes, the justices, or recorder at the quarter sessions) deems it inexpedient or impracticable to decide at once and of itself, it reserves the point for the consideration of the court for crown cases reserved; provided, of course, a conviction takes place—for, otherwise, there would be no need for further consideration.(*f*) Such court consists of the judges of the high court of justice, or five of them at least, of whom the lord chief justice of England, the lord chief justice of the common pleas division, or the lord chief baron must be one.(*g*)

The court reserving the point may respite execution of the judgment on such conviction, or postpone the judgment until the question is decided. And, in either case, to secure the appearance of the defendant when he is required, the court will, in its discretion, either commit him to prison, or take a recognizance of bail, with one or two sureties.(*h*)

The court for crown cases reserved hears counsel on either side, even though counsel do not appear on the other side. If they appear on both sides, the counsel for

(*d*) 36 and 37 Vict., c. 66, §§ 18, 19, 47. As to 11 and 12 Vict., c. 78, v. p 451.

(*e*) 36 and 37 Vict., c. 66, § 45. (*f*) 11 and 12 Vict., c. 78, § 1.

(*g*) Ibid., § 3; 36 and 37 Vict., c. 66, § 47.

(*h*) 11 and 12 Vict., c. 78, § 1.

the prisoner begins and has a reply. If counsel do not appear at all, the lord chief justice or lord chief baron presiding reads the case, and then judgment is pronounced. The judgment is that the court reverses, affirms, or amends the judgment of the court reserving the point; or avoids such judgment, and orders an entry to be made on the record that, in the opinion of the court for crown cases reserved, the party convicted ought not to have been convicted; or orders judgment to be given at some other assizes or sessions, if no judgment has been given up to that time; or makes such other order as justice requires. The order of the court, whether for execution of judgment or discharge of the prisoner, is carried out by the sheriff or jailer in whose custody the person convicted is, to whom a certificate of such order is transmitted by the clerk of the assize or of the peace.(*i*) The court may send the case back for amendment, and, after that has been effected, judgment will be delivered.(*k*)

The determination of any such question in the manner indicated above is final and without appeal.(*l*)

[The judgment upon a verdict of conviction can be reviewed by the proper appellate court. The proceeding, varying in form, and called by different names in the different states, is every-where substantially the same. In Illinois and Michigan, the proceeding is called writ of error; in Ohio, petition in error; in Kentucky, Indiana, and Illinois, it is called appeal. In all, the object of the proceeding is to transmit the record of the trial court to the appellate court, in order that the appellate court may determine if there is error in the record, to the prejudice of the plaintiff in error or appellant, and thereupon render appropriate judgment.

In Ohio, in any criminal case, a judgment of a court or officer inferior to the court of common pleas may be reviewed in the court of common pleas; judgment of any court inferior to the district court may be reviewed in the

(*i*) 11 and 12 Vict., c. 78, § 2. (*k*) Ibid., § 4.
(*l*) 36 and 37 Vict., c. 66, § 47.

district court; and the judgment of any court inferior to the supreme court, may be reviewed in the supreme court.

The plaintiff in error files his petition in error with a transcript of the record in the appellate court. Petition in error can not be filed in the supreme court, without an allowance by the supreme court or a judge thereof; in capital cases, the allowance must be by the court or by two judges thereof. Upon hearing, the court may affirm the judgment or reverse it, in whole or in part, and order the accused to be discharged, or grant a new trial.(1)

In Kentucky, the court of appeals has appellate jurisdiction in all cases of felony, and also in penal actions and prosecutions for misdemeanors, where the judgment is for a fine exceeding fifty dollars or imprisonment exceeding thirty days. The circuit court has appellate jurisdiction from the judgments of inferior tribunals, where the sentence is a fine of twenty dollars or more, or is imprisonment. Where an appeal is taken to the circuit court, the defendant files in the circuit court a copy of the summons or warrant, and of the judgment, together with a statement of the costs, and the case is tried in the circuit court as if no judgment had been rendered.

Where, after judgment in the circuit court, the defendant, at the same term, prays an appeal, the appeal is granted as a matter of right. The appeal is perfected by lodging in the clerk's office of the court of appeals, within sixty days after the judgment, a certified transcript of the record. The clerk issues a certificate that the appeal has been taken, but no summons or notice is necessary. A judgment of conviction must be reversed for any error of law, to the defendant's prejudice, appearing on the record. But it shall not be reversed for error in instructing or refusing to instruct the jury, unless the bill of exceptions contains all the instructions given to the jury.(2)

It is provided in the chapter on bills of exceptions, that decisions of a court upon challenges to the panel, and for

(1) 74 Ohio L. 359-361. (2) Crim. Code, title 9.

cause, upon motions to set aside an indictment, and upon motions for new trial, shall not be subject to exception.(1)

In Indiana, an appeal to the supreme court can be taken as a matter of right, by the defendant, from any judgment against him. It must be taken within one year after the rendering of the judgment. It is taken by serving on the clerk of the trial court notice that the defendant appears, and a similar notice upon the prosecuting attorney. The appellate court must give judgment without regard to technical errors or to exceptions which do not affect the substantial rights of the parties, and may reverse, affirm, or modify the judgment appealed from, and may, if necessary, order a new trial.(2)

In Illinois, in capital cases, the party aggrieved by manifest and material error appearing on the record may be relieved by writ of error, if the writ be allowed to issue by the supreme court in session, or by a judge thereof in vacation. In all other cases, a writ of error is a writ of right, and is issued of course.(3) The jury, in criminal cases, is judge of law and fact.(4) But the defendant may except to any ruling or decision of the judge, as in civil cases,(5) and, hence, may except to the court's overruling a motion for new trial.(6)

The provisions for appeal in Iowa are substantially the same as in Indiana.(7) In Iowa, if the judge to whom a bill of exceptions is tendered does not sign it within a day, it may be signed and sworn to by two or more attorneys or officers of the court, or disinterested bystanders, and filed with the clerk, and thereupon becomes part of the record.(8)

In Michigan, no writ of error, upon a judgment of conviction for treason or for murder in the first degree, issues, unless allowed by one of the justices of the supreme court, after notice to the attorney-general. In all other cases, the

(1) Crim. Code, title 9, § 281.
(2) Rev. Stat. (1876), vol. 2, pp. 410–412.
(3) Rev. Stat. (1877), p. 409. (4) Ibid., p. 405.
(5) Ibid., p. 406. (6) Ibid., p. 742.
(7) Rev. Stat. (1873), pp. 696–699. (8) Ibid., 692.

writ issues as a matter of course. All proceedings upon writs of error are to be according to the course of the common law, as modified by practice and usage in the state, and by such general rules as may be made by the supreme court.(1)

In Ohio, Kentucky, Indiana, and Iowa, the state, as well as the defendant, can take a case by petition in error or by appeal to the appellate court. In Indiana, the state can appeal only upon a judgment for the defendant, on quashing or setting aside an information or indictment; upon an order of court arresting the judgment; or upon a question reserved by the state. Upon such appeal in Indiana, the supreme court can reverse a judgment quashing or setting aside an indictment or information, or an order arresting judgment; but in all other cases of appeal by the state the decision of the supreme court only settles the question of law reserved, but does not affect the judgment rendered in the case.(2) In Kentucky, a judgment in favor of the defendant which operates as a bar to a future prosecution for the offense can not be reversed by the court of appeals.(3) In such cases in Kentucky, and in all cases in Ohio and Iowa, the judgment of the appellate court has no effect upon the judgment rendered below, but only settles for future cases the law upon the questions considered.

Judgments in criminal cases in the federal courts are final, and are not subject to review by proceeding in error or an appeal. The district court must remit every indictment found therein for a capital offense, and may remit any indictment involving difficult and important questions of law to the circuit court; whereupon the circuit court proceeds as if the indictment had originally been found therein.(4) When the judges of a circuit court are divided in opinion upon any question in a criminal proceeding, the point shall, on request of either party, be certified to the supreme court. But this shall not prevent the cause from

(1) Rev. Stat. (1871), pp. 1969, 1970.
(2) Rev. Stat. (1876), vol. 2, p. 411. (3) Crim. Code, § 339.
(4) Rev. Stat., p. 192.

proceeding, if, in the opinion of the court, further proceedings can be had without prejudice to the merits.(1) If the circuit or district court render judgment without having jurisdiction, the defendant can be discharged by the supreme court on *habeas corpus*.(2)]

(1) Rev. Stat., p. 117.

(2) Ex parte Lange, 18 Wall. 163.

CHAPTER XXIII.

REPRIEVE AND PARDON.

A REPRIEVE (*reprendre*) is the withdrawing of a sentence for an interval of time, whereby the execution of a criminal is suspended.(*m*)

Reprieves may be granted either:

i. By the *crown* (*ex mandato regis*) at its discretion; its pleasure being signified to the court by which execution is to be awarded.

ii. By the *court* empowered to award execution, either before or after verdict (*ex arbitrio judicis*). Generally, it must be guided by its own discretion, as to whether substantial justice requires it, as, for example, when it is not satisfied with the verdict. But in two cases the court is bound to grant a reprieve. (a.) When a woman sentenced to death is ascertained to be pregnant. To discover whether she is *quick* with child a jury of twelve matrons is impaneled. If so found, she is reprieved until either she is delivered or proved by the course of nature not to have been with child at all. But after she has been once delivered, she can not be reprieved on this ground a second time. (b.) When the prisoner becomes insane after judgment. We have already seen that the occurrence of insanity in the prisoner is a stay to proceedings at any stage.

Pardon.—The exercise of the prerogative of pardoning is at the absolute discretion of the sovereign. If, either from the opinion of judges represented to him, or for any other reason, the home secretary thinks the case a fit one for the interposition of royal mercy, he recommends the same to the queen, and she usually acts on the recommendation.

The sovereign can not pardon where private interests

(*m*) 4 Bl. 394.

are principally concerned in the prosecution of offenders "*non potest rex gratiam facere cum injuria et damno aliorum;*" for example, a common nuisance can not be pardoned while it remains unredressed. But a recent statute(*n*) enables the sovereign to remit penalties, although they may be wholly or in part payable to some other than the crown.(*o*) There is another case in which the offender can not be pardoned, namely, when he is guilty of the offense of committing a man to prison out of the realm.(*p*) It should also be noticed that a pardon can not be pleaded to an impeachment so as to stifle the inquiry. But of course the person impeached and sentenced may be afterward pardoned.(*q*)

A pardon must be by warrant under the great seal, or under the sign manual. As a rule, it is to be taken most beneficially *for* the subject and *against* the queen.(*r*)

A pardon may be *conditional*—the most frequent example of which is when a person sentenced to death is pardoned on the condition that he submit to punishment either of penal servitude or imprisonment.(*s*) [Where a pardon is granted on condition, and there is a breach of the condition, the pardon becomes void, and the convict may be remanded to undergo sentence.(1)]

Ticket of leave.

In connection with the subject of pardon, it will be convenient to notice the case of those who are allowed to be at large before the expiration of their term of confinement.

When any person is sentenced to penal servitude or imprisonment, the queen, by order in writing under the hand and seal of the secretary of state, may grant him a *license to be at large* in the United Kingdom and the Channel Isl-

(*n*) 22 Vict., c. 32.

(*o*) See also 24 and 25 Vict., c. 96, § 109; c. 97, § 67.

(*p*) 31 Car. 2, c. 2. (*q*) 12 and 13 Wm. 3, c. 2, § 12.

(*r*) See further 4 St. Bl. bk. vi, c. 25.

(*s*) v. 5 Geo. 4, c. 84; 20 and 21 Vict., c. 3.

(1) People *v.* Potter, 1 Parker Crim. Ca. 47; State *v.* Smith, 1 Bailey, 123; State *v.* Fuller, 1 McCord, 178; Commonwealth *v.* Haggerty, 4 Brewster, 326.

ands, or in such part thereof respectively as in such license shall be expressed, during such portion of the term of penal servitude or imprisonment, and upon such conditions as her majesty thinks fit. But the license may be revoked or altered at the queen's pleasure. It will be forfeited in the event of (a) a subsequent conviction, (b) of failure to report himself to the police unless prevented by unavoidable cause, (c) of changing residence without due notification. On the subsequent conviction the offender will first suffer the punishment attached to such offense, and then finish his original term. If the license is revoked, the convict may be apprehended and sent back to the prison from which he came to undergo the residue of his sentence; or he may be sent to any other prison wherein convicts under sentence of penal servitude may lawfully be confined.

Certain offenses connected with these licenses subject the holders to imprisonment for a term not exceeding three months, on summary conviction. The holder of a license suspected of committing an offense may be apprehended without a warrant.(*t*)

In the case of those sentenced to penal servitude, the remission of a part of the term, proportioned to the number of years contained in the sentence, follows as a matter of course, if the convict conducts himself well. But if the sentence is penal servitude for life, the special order of one of the secretaries of state is required.

(*t*) 16 and 17 Vict., c. 99, §§ 9–11; 20 and 21 Vict., c. 3, § 5; 27 and 28 Vict., c. 47, §§ 4–10; 34 and 35 Vict., c. 112, §§ 3–5.

CHAPTER XXIV.

EXECUTION.

EXECUTION is carried out by the sheriff or his deputy, thus giving effect to the sentence of the judge. It is the usage for the judge, at the end of the assizes, to sign the calendar containing the prisoners' names and sentences. This is left to the sheriff as his warrant and authority; and if he receive no special order to the contrary, he executes the judgment therein contained.

The criminal is usually executed about a fortnight or three weeks after his sentence. An execution for murder must take place within the walls of the prison in which the offender is confined at the time.(*u*)

If the execution be not by the proper officer, or if not carried out in strict conformity with the sentence, as if the criminal is beheaded instead of hanged, the official is guilty of murder. If the criminal survives, he must be hanged again, inasmuch as the sentence is that he be hanged by the neck till he is dead.

(*u*) 31 Vict., c. 24, § 2.

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